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EXCUSING THE CRAZY: THE INSANITY DEFENSE RECONSIDERED

STEPHEN J. MORSE*

The shock generated by the verdict in the Hinckley case¹ has revived recurrent criticism and efforts to abolish or reform the insanity defense.² Unpopular or even "wrong" verdicts occur in all areas of law, however, and should not spur intemperate attempts to change fundamentally just laws. Our task as a society is to decide whether the insanity defense is morally necessary. If we decide that it is, we must ensure that insanity defense trials are conducted rationally, that questionable verdicts are minimized, and that the disposition of those acquitted by reason of insanity leads to the protection of society and the proper treatment of the persons acquitted.

The purpose of this Article is to facilitate these tasks by considering both the substance and the procedure of the insanity defense and the most common suggestions for its abolition or reform. I believe that the insanity defense ought to be retained because it is basically just, and that sensible and fair reforms can remedy most of the problems associated with it.³ Part I of this Article addresses the morality of the defense. Part

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An earlier version of this paper was submitted as testimony to the Subcommittee on Criminal Justice, Committee on the Judiciary of the United States House of Representatives, on September 9, 1982. In its present form, it was first delivered as a Harris Lecture at the School of Law, Indiana University, Bloomington and then presented to a Faculty Workshop at the University of Southern California Law Center. It will appear in revised form in my forthcoming book, *The Jurisprudence of Craziness*, to be published by Oxford University Press.

Special thanks are due to Michael Moore, W.T. Jones, Richard Craswell, Erwin Chemerinsky, Michael Levine, Alan Schwartz, Michael Shapiro, and Samuel Pillsbury, Jr. for their help. Michael Moore, especially, has consistently helped me to understand the underlying philosophical issues.

1. *United States v. Hinckley*, 525 F. Supp. 1342 (D. D.C. 1981), *aff'd*, 672 F.2d 115 (1982).

2. See the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 401, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2057.

3. I must here confess past error and repudiate former views. I have previously argued that the impact of mental disorder on criminal responsibility could be considered without retaining the insanity defense. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51

II considers an array of criticisms that are often made, but that are insubstantial. Part III argues that the alternatives to the insanity defense are unacceptable. Part IV suggests practical reforms that should make the defense work better.

I. THE MORAL BASIS OF THE INSANITY DEFENSE

The basic moral issue regarding the insanity defense is whether it is just to hold responsible and punish a person who was extremely crazy at the time of the offense.⁴ Those who believe that the insanity defense should be abolished must claim either that no defendant is extremely crazy at the time of the offense or that it is morally proper to convict and punish such people. Neither claim is easy to justify.

In all societies some people at some times behave crazily—that is, the behavior at those times is recognizably, aberrantly irrational. A small number of these people behave extremely crazily on occasion, including those times when an offense is committed. A hypothetical defendant with a delusional belief that he is the object of a murderous plot, who kills one of the alleged plotters after hallucinating that he hears the plotter's foul threats, is crazy. Such cases are rare, but clearly exist; the influence of extreme craziness on some criminal behavior cannot be denied.

S. CAL. L. REV. 527, 640-45 (1978). For the reasons set forth in the present Article, I now believe my prior position was incorrect.

Other writers who have recently addressed the insanity defense debate include N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 53-87 (1982); Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194 (1983); Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605 (1982); Stone, *The Insanity Defense on Trial*, 33 HOSP. & COMMUNITY PSYCHIATRY 636 (1982). The insanity defense has produced an extraordinarily voluminous literature in the past. E.g., A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963); Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973). See generally D. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES* 153-80 (1983) (bibliography).

4. I use the word "crazy" advisedly and with no lack of respect for either disordered persons or the professionals who try to help them. It refers to behavior that is weird, loony, or nuts; less colloquially, it is behavior that seems inexplicably irrational. I chose the word "crazy" because I believe that it is the best generic term to describe the type of behavior that leads to a diagnosis or label of mental disorder. At the same time, it avoids begging questions about whether the crazy person was capable of behaving less crazily. When one engages in the discourse of illness, disease, or disorder, it is often assumed that the phenomena being discussed are uncontrollable manifestations of abnormal biological processes. But the truth is that our understanding of behavior, including very crazy behavior, is limited, and neither mental health scientists nor laypersons really know to what degree behavior of any sort can actually be controlled. Thus, I prefer to use a nonjargon word to describe the type of behavior—crazy behavior—with which the law is concerned in insanity defense cases. For a complete discussion of these issues, see Morse, *supra* note 3, at 543-60.

For hundreds of years the common law has recognized the unfairness of holding some crazy persons responsible for their criminal behavior.⁵ The legal test for insanity, designed to identify the appropriate persons to be excused, has changed over the years. Whether the test seeks to excuse only those akin to wild beasts or also those who lack substantial capacity to conform their conduct to the requirements of law, the moral perception has remained constant: at least some crazy persons should be excused. Those who would abolish the defense must argue that no sound principles underlie the law's consistent retention of the defense. That most past discussions of the issue have failed clearly to identify such principles⁶ is hardly an argument that they do not exist. I maintain that such sound principles do exist; some persons whose craziness influences their criminal behavior cannot fairly be held responsible and thus do not deserve punishment.

To justify the moral necessity of the insanity defense, I must set forth some assumptions I make about our system of criminal justice. Conviction and punishment are justified only if the defendant deserves them. The basic precondition for desert in all contexts, legal and otherwise, is the actor's responsibility as a moral agent. Any condition or circumstance that sufficiently compromises responsibility must therefore negate desert; a just criminal law will incorporate such conditions and circumstances in its doctrines of excuse. A coherent, purely consequentialist theory of criminal justice, while conceivable, is so unattractive morally that few persons, including most critics of the insanity defense, adhere to such a position.⁷ Moreover, our present system clearly rests on a much different basis:⁸ our system of criminal justice accepts desert, whether viewed as a defining or limiting principle,⁹ as fundamental to guilt and punishment.

5. The modern insanity defense dates at least from Hadfield's case. *Rex v. Hadfield*, 27 State Trials 1281 (1800). A modern insanity defense has also been a feature of continental law for at least two centuries. See, e.g., R. NYE, *CRIME, MADNESS, AND POLITICS IN MODERN FRANCE* 28 (1984).

6. Goldstein & Katz, *supra* note 3, at 859-63. Michael Moore has identified such principles in an excellent piece to which this Article is heavily indebted. Moore, *Legal Conceptions of Mental Illness*, in *MENTAL ILLNESS: LAW AND PUBLIC POLICY* 25, 42-44, 56-62 (B. Brody & H. Engelhardt eds. 1980).

7. B. WOOTTON, *CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST* (1963) is the best known example of a consequentialist view.

8. Most modern commentators share this view. E.g., N. MORRIS, *supra* note 3, at 146-60, 183; A. VON HIRSCH, *DOING JUSTICE* 45-55 (1976).

9. N. MORRIS, *supra* note 3, at 182-83. Professor Morris defines a "defining principle" of punishment as one that would give the exact punishment to be imposed, and a "limiting principle" as one that would give the "outer limits of leniency and severity which should not be exceeded." *Id.* A system that requires proof of *mens rea* for most crimes is clearly a system based partly on desert. See Hart, Jr., *The Aims of Criminal Law*, 23 *LAW & CONTEMP. PROBS* 401, 407-08 (1958).

A. IRRATIONALITY AND COMPULSION: THE CRITERIA FOR EXCUSE

The insanity defense is rooted in moral principles of excuse that are accepted in both ordinary human interaction and criminal law. Our intuition is that minimal rationality (a cognitive capacity) and minimal self-control or lack of compulsion (a volitional capacity) are the essential preconditions for responsibility.¹⁰ Young children are not considered responsible for the harms they cause precisely because they lack these capacities.¹¹ Similarly, adults who cause harm while terrifically distraught because of a personal tragedy, for instance, will typically be thought less responsible and culpable for the harm than if they had been normally rational and in control.¹² Aristotle recognized these fundamental requirements for responsibility by noting that persons may be less blameworthy for actions committed under the influence of mistake (a cognitive problem) or compulsion (a so-called volitional problem).¹³

Criminal law defenses that focus on the moral attributes of the defendant are based on these same intuitions and principles. Even if the defendant's conduct fulfills the usual requirements for *prima facie* guilt—that is, act, mental state, causation, result—the defendant will be found not guilty, not culpable, if the acts committed were the products of cognitive (e.g., infancy) or volitional (e.g., duress) circumstances that were not under the defendant's control. These defenses are considered relevant at the time of guilt determination as well as at the time of sentencing. It would be indeed illogical in a criminal justice system based partly on desert to hold that a defendant with a valid claim of duress is culpable (because he or she intended to do the compelled act), but then to decide to release the defendant because he or she does not deserve punishment. To convict a person with a meritorious defense would offend our conception of the relationship between legal guilt and blameworthiness. A person acting under duress is not culpable, although it is unfortunate that a prohibited act has been committed.

10. Although cases of strict liability are exceptions, penal sanctions for regulatory offenses are morally hard to justify. Indeed, they are usually justified on a consequential basis: as controlling social harms without regard to the offender's fault. *Morrisette v. United States*, 342 U.S. 246, 254-60 (1952).

11. See, e.g., W. LAFAVE & A. SCOTT, JR., *CRIMINAL LAW* 351-53 (1972) (discussing the legal doctrine of infancy as an excuse). They may be restrained and trained to avoid causing similar harms in the future, but they are not considered culpable as fully responsible moral agents.

12. See, e.g., the Model Penal Code's doctrine of "extreme mental or emotional disturbance," which will reduce a homicide conviction from murder to manslaughter. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

13. ARISTOTLE, *NICHOMACHEAN ETHICS*, Book III: Ch. 1 (R. McKeon ed. 1947).

In sum, the moral basis of the insanity defense is that there is no just punishment without desert and no desert without responsibility. Responsibility is, in turn, based on minimal cognitive and volitional competence. Thus, an actor who lacks such competence is not responsible, does not deserve punishment, and cannot justly be punished.

The discussion so far has been premeditatedly vague about two issues that must now be clarified: the meanings of rationality and compulsion and the extent to which these factors affect moral accountability. Rationality is notoriously hard to define,¹⁴ but a reasonable working definition would include reference to both the sensibleness of the actor's goals and the logic of the means chosen to achieve them. It is, of course, difficult to say that the preferences or goals of another are irrational or not sensible, but there is no alternative to making these judgments within the social context in which those preferences are held. In a rough and ready fashion, we may ask whether, given the social context, any sense can be made of the actor's goals, whether any reasonable person could hold them, whether they are logically or empirically intelligible. Thus, in our society, it is generally considered rational to be a member of a so-called "fringe" religion because our society approves of diverse religious beliefs. In contrast, it does not make sense to want (truly) to be a Martian. These judgments about the intelligibility or rationality of goals can be made so long as we recognize that few goals are rational or irrational in an ultimate sense and we make a general presumption in favor of rationality.

It is easier to assess the rationality of the means an actor chooses to achieve goals because this assessment involves factual beliefs about the world or logical relationships. The inquiry becomes whether instrumental behavior is rationally connected to achieving identified goals. In Aristotelian terms, is the actor a good "practical reasoner"? As my colleague Scott Bice has shown so helpfully, an actor may be irrational about means/ends relationships in many respects.¹⁵ First, an actor may believe that certain means will not achieve the preferred goal, but may employ those means nevertheless. If the actor's statements accurately reflect the preferred goals, this choice of means is a clear instance of irrationality.

14. Brandt, *The Concept of Rational Action*, 9 SOC. THEORY & PRAC. 143, 143 (1983); Macklin, *Philosophical Conceptions of Rationality and Psychiatric Notions of Competency*, 57 SYNTHESE 205, 205-06 (1983). See generally Frankena, *Concepts of Rational Action in the History of Ethics*, 9 SOC. THEORY & PRAC. 165 (1983) (providing a history of past concepts of rational action).

15. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 9-12 (1980). The categorization in the text of this Article follows Dean Bice's categories precisely, although I have changed some of the examples.

Second, it may be that the actor believes that the means will achieve the preferred goals, but the belief is empirically unjustifiable. For example, a law student who wishes to succeed in law school, but tries to do so by minimizing class attendance or failing to complete assignments and by maximizing recreational reading instead, has an irrational belief about the means chosen. A third and related form of irrationality arises when the goal of the action conflicts with a goal the actor considers superior. Suppose we ask our law student how getting a degree ranks compared to other goals. The law student responds that graduation is far superior to most other goals, including being well read. The student's behavior is then irrational because recreational reading is inconsistent with and inferior to the higher ranked goal of graduating. A fourth type of irrationality about means exists when the actor believes the means chosen are a less efficient method to achieve a particular goal, but cannot give an independent and superior goal that the less effective means serves. This form of irrationality is well known to economists. Finally, the actor may believe the means chosen are the most efficient to achieve a goal, but the belief is empirically implausible.

This list of types of means/ends irrationality is surely not exhaustive or the only way to individuate the types of irrationality, but it does provide a framework for thinking about what instrumental irrationality means. If one tests this framework with cognitive craziness, say a delusional belief system, it works very well indeed. For instance, the person who gouges his eye out because he believes he is the Lord's prophet and that mutilating himself will produce peace on earth,¹⁶ surely has an intelligible, rational goal, but the means chosen violates instrumental rationality in a number of ways. If the actor has beliefs that are simply not justifiable on any reasonable view of the world and seems incapable of correcting the errors by logic or evidence, then it is fair to conclude that the actor is irrational with respect to the behavior in question.

Now let us turn to a discussion of the criteria for compulsion. Although it is a vague concept at best,¹⁷ we may define compulsion generally as hard choices that society cannot ask defendants to make at their peril. But what are the criteria of choices so hard that a defendant's "wrong" choice should be excused? First, it must be the case that the defendant will experience substantially greater physical or psychological pain if he or she behaves lawfully/rightly than if he or she behaves un-

16. See *Mayock v. Martin*, 157 Conn. 56, 245 A.2d 574 (1968).

17. Audi, *Moral Responsibility, Freedom, and Compulsion*, 11 AM. PHIL. Q. 1, 8 (1974). This excellent, influential article has heavily influenced my formulation of compulsion.

lawfully/wrongly.¹⁸ In other words, the pain produced by performing the lawful/right act must outweigh the pain produced by performing the unlawful/wrong act, the latter of which is usually a strong counterweight to wrongdoing.¹⁹ Let us consider a range of examples. First, the typical case of duress fits this criterion: the defendant will suffer greater pain if he or she does not perform the commanded, wrongful deed than if he or she does. Now consider the drug dependent person (DDP) who is physically addicted to the drug. A DDP who does not take the drug will undergo the psychological and physical pain of withdrawal. This pain may very well be greater than the pain produced by fear of violating the law or by other psychological factors such as the loss of self-respect. Finally, take the hypothetical of a driver who rounds a turn on a mountain road and sees two children lying in the road. If the driver runs over the children, surely killing both of them, the driver lives; if the driver swerves to avoid them, the driver will go over the edge of the cliff, plunging to a certain death.²⁰ Although theoretically all lives are equal, the immediate pain of losing one's own life is greater than the pain produced by the possibility that the law may punish the driver in the future. In all these cases, the actor is reasonably rational: the practical syllogism leading to action is logically intact, but the actor faces a very hard choice.

The second criterion of a hard choice is that the actor's primary motivation for choosing the wrong alternative must be fear of the anticipated pain from choosing the right alternative.²¹ Even if the right choice would produce more pain than the wrong choice, if the person chooses the wrong alternative for personal gain rather than for fear of pain, the choice is not hard because the action chosen is what the actor positively wants to do. Consider the example of Martin Luther. Failing to profess his faith (the "right" choice from the Church's viewpoint) would have caused greater pain than professing it, but his profession was hardly compelled. It was not the fear of pain from failure to profess that motivated him; it was instead an affirmative, easy choice. By comparison, the person subject to duress acts out of fear of the consequences of not following the command. The DDP may take drugs for fear of the pain abstinence will produce. By contrast, the person who takes drugs primarily for plea-

18. See *id.* at 7-8. I cannot provide a precise, scientific definition of "psychological pain" because none exists. I mean nothing arcane by the phrase, however.

19. See A. GOLDMAN, *A THEORY OF HUMAN ACTION* 123 (1970) ("A want is compulsive when it retains its strength or intensity despite apparently strong counter-forces.").

20. See S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 798 (4th ed. 1983) (using this hypothetical to elucidate the differences between necessity and duress).

21. Audi, *supra* note 17, at 6. The actor need not be emotionally distraught, but the desire to avoid the greater pain must be the primary motivation for wrongdoing.

sure and not for fear of the pain of withdrawal is not compelled. The fear of pain often creates the driven, or pressured, quality typically associated with cases of compulsion: the feeling that the actor "had no choice."

The last criterion of compulsion is that the actor should be excused only if there was no reasonable alternative to the wrong action. For example, the duress excuse would not apply if the actor could have overcome or escaped from the threatener without undue danger. The DDP would have no compulsion excuse to the crimes of possession and use, nor would the kleptomaniac have a defense to theft, if treatment programs or other alternatives were available but had not been tried in good faith. In most pure cases of inner compulsion, where the actor's rationality is unimpaired, reasonable alternatives will be available. If a reasonable alternative is available, it is fair to conclude that the choice was not too hard and that the actor may fairly be blamed and punished for the wrongdoing.²²

Assessing the difficulty of a particular choice requires a quantitative and qualitative evaluation of the three criteria outlined above. In general, the degree of compulsion increases in proportion to (1) the increase in the differential in pain between acting lawfully/rightly and unlawfully/wrongly; (2) the increase in fear and decrease in personal gain as the motive for acting unlawfully/wrongly; and (3) the decrease in availability of and ease of using the alternatives. Although such evaluations are difficult to make, especially in cases of inner compulsions where there are fewer objective indicators, these guides to assessing the criteria for hardness of choice should furnish some benchmarks.²³

22. A question about the reasonable alternative criterion is whether the availability of alternatives should be judged subjectively or objectively. In other words, should the excuse be allowed if the defendant was unaware of alternatives, or only if a reasonable person would have been unaware of alternatives? Although it is more stringent, the objective approach seems odd in the insanity defense context because awareness of alternatives depends on cognitive rationality. Cognitive rationality is precisely what a defendant usually lacks where the insanity defense is truly appropriate, however, so the objective approach may appear unfair. But if the defendant is too irrational to be aware of alternatives, then the irrationality criteria for the insanity defense will be satisfied and the defendant will not need to rely on a claim of compulsion. By contrast, it is fair to expect that the rational defendant facing a hard choice is capable of being aware of the reasonable alternatives under the circumstances. Consequently, the objective approach is not unfair, or at least no more so than other objective tests of criminal liability. If the objective approach is adopted, defendants who are unreasonably unaware of alternatives should perhaps be guilty only of negligence, even if they knew what they were doing and acted intentionally. Cf. MODEL PENAL CODE § 3.09(2) (Proposed Official Draft 1962) (no justification for reckless or negligent use of otherwise justifiable force if crime was one of recklessness or negligence). Support for the subjective approach consists of the familiar contention that criminal liability should be based on a subjective standard in most cases.

23. Weighing the pain balance and assessing motivation will be problematic processes requiring impressionistic judgments based on the actor's past history and what we know of the actor's

The criteria I have offered for compulsion comport with our moral intuitions and practices. If a choice is too hard, it is *unfair* to blame and punish the actor who has no reasonable alternative. This is not to say that the actor has no choice.²⁴ Sainly persons might be willing to undergo any pain rather than harm another, but the criminal law cannot expect such saintly behavior from ordinary persons. In addition, possible future criminal punishment will have little deterrent effect on a person faced with the immediate and severe pain of making the "right" choice in a hard-choice situation.

How much irrationality and compulsion are necessary for moral and legal excuse? The degree of rationality or self-control that may be involved in a specific act is rarely an all-or-none matter, and these factors may vary in degree over time during one's life. Similarly, the degree of rationality or self-control that society and the law require for responsibility may vary over time within a society and among societies. One need not be totally irrational or compelled to be excused, but at various times and in various places more or less may generally be expected from people.

The most important point to recognize, however, is that mental health science cannot set the legal standard for irrationality or compulsion in the context of legal accountability because setting the standard is not a scientific issue. The standard is a moral and social standard, to be set by those legal institutions empowered by a society to make individual moral and social decisions. In our society, for example, the substantive standards for legal insanity should be set largely by the legislature and interpreted by the courts, and individual cases should be decided by juries and judges.

The criteria for lack of responsibility also include the requirement that the irrationality or compulsion must be nonculpable. In other words, the actor should not be excused if the irrationality or compulsion was the result of the person's rational, voluntary act. If the irrationality is produced by the voluntary and knowing ingestion of a hallucinogen, for example, the actor is entirely responsible for the subsequent irration-

psychological and physical make-up. See Audi, *supra* note 17, at 12. There is no substitute for such judgments that will be less impressionistic, however, or less so than many other legal judgments. Furthermore, the difficulty in making these judgments does not necessitate the conclusion that they will require expert conclusions. Experts can provide behavioral data, but weighing the pain balance and assessing motivation require only common sense inferences from such data.

24. The French distinguish between physical compulsion and moral compulsion to capture precisely this difference. G. FLETCHER, *RETHINKING CRIMINAL LAW* 803 n.5 (1978).

ality and will therefore not be excused.²⁵ Similarly, a mentally disordered person who is able to control the disorder or its effects will be held responsible if such a person could have taken medicine, exercised will-power, or whatever.²⁶

The insanity defense issue, then, is whether in some cases extreme craziness (involved in the defendant's offensive conduct) so compromises the defendant's rationality or creates such compulsion that it would be unjust to hold the defendant responsible. Whatever skepticism exists about the scientific status of psychiatry and psychology, it is clear that a small number of persons commit offenses under the influence of extremely crazy states of mind.²⁷ Even resolute opponents of the insanity defense, such as Norval Morris, admit that there "is indeed some quite florid psychopathology [i.e., crazy behavior] . . . among those for whom these pleas are made."²⁸ The law should mitigate the punishment of such people because, presumably, they are less responsible. These admissions concede that craziness can affect the foundational capacities for responsibility. In light of such a concession, opponents of the insanity defense should have the burden to demonstrate that no mentally disordered defendant should be excused entirely.

B. CRITICISM OF THE MORAL BASIS OF THE INSANITY DEFENSE

Norval Morris has presented the most recent, important, nonconsequentialist argument for abolishing the insanity defense in his book, *Madness and the Criminal Law*.²⁹ Professor Morris suggests numerous consequentialist arguments for rejecting the insanity defense, but, believing in desert as a limiting principle in criminal law, he confronts directly "the question of fairness, the sense that it is unjust and unfair to stigma-

25. MODEL PENAL CODE § 2.08 (Proposed Official Draft 1962).

26. Note, however, that in these latter cases the actor's culpability may be affected although an excuse based on irrationality or lack of self-control does not obtain. For instance, a hypothetical actor who is delusional because of a controllable mental disorder or the voluntary ingestion of a hallucinogen, and consequently does not realize the victim killed is a person, cannot be guilty of intentional homicide because the actor lacks the requisite *mens rea* of intending to kill a person. The actor may be guilty of negligent or even reckless homicide, however, because a reasonable person should have been aware, or the actor may in fact have been aware, that the homicidal behavior was foreseeable. Again, the lack of culpability in this case is based on the absence of a requisite *mens rea*, not on the presence of the excusing condition of irrationality.

27. Consider again the case of our hypothetical, wildly deluded and hallucinating person who kills in response to the delusional belief, buttressed by nonexistent voices, that there is a murderous plot against him.

28. N. MORRIS, *supra* note 3, at 83.

29. N. MORRIS, *supra* note 3.

tize the mentally ill as criminals and to punish them for their crimes."³⁰ Professor Morris denies that the mentally disordered lack the capacity to choose their behavior.³¹ In brief, he argues that other causes, such as social disadvantage, are far more criminogenic than mental disorder (including severe disorder), yet we do not excuse those who are poor or the products of broken homes. Professor Morris concludes, "[a]s a rational matter it is hard to see why one should be more responsible for what is done to one than for what one is."³² This conclusion is surely correct. It does not follow from the argument presented for it, however, which makes a morally irrelevant comparison between the poor and the mentally disordered.

Professor Morris confuses causation with excuse, a confusion that has consistently bedeviled criminal law theorists. Causation is not an excuse, however, for all behavior is caused. If causation were an excuse, no one would be held responsible for *any* behavior, criminal or not.³³ Moreover, causation is not the equivalent of the subspecies of excuse that we term compulsion.³⁴ Compulsion exists when the person faces a regrettable hard choice that leaves one with no reasonable alternative to wrongdoing.³⁵ Again, if causation were the equivalent of compulsion, no one would be responsible because all would be compelled. Causation is not the issue; nonculpable lack of rationality and compulsion is. Understood in these terms, Professor Morris' conclusion that a person should not be more responsible for what is done to one than for what one is does indeed

30. *Id.* at 61.

31. Professor Morris uses the locutions "freedom of choice" and "absence of choice" to characterize the criteria for responsibility and nonresponsibility. *Id.* I believe that these locutions and related terms such as free will and determinism are entirely confusing in the legal and psychiatric literature. See H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 71-81 (1972). Rather than being the criteria for responsibility, they are typically used as conclusory synonyms for responsibility. For instance, what does it mean to say that a person lacks free will? If it means that the person's behavior is uncaused, then it is conceptually confused and morally irrelevant. In a causal universe, all phenomena, including behaviors, are caused. If free will means that the person is not compelled, then it is a reasonable synonym for one criterion of responsibility—as long as compulsion is not simply the equivalent of "caused." In any case, terms such as free will are notoriously obscure. Writers should try to describe the behavioral criteria for responsibility rather than using conclusory, metaphysical terms. These issues are discussed *infra* in the text accompanying notes 33-34.

32. N. MORRIS, *supra* note 3, at 63. Professor Morris also makes a number of practical arguments about the defense, but the heart of his moral argument is presented in the text.

33. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. (forthcoming 1985) (copy on file with *Southern California Law Review*); Morse, *Psychology, Determinism, and Legal Responsibility*, in 33D NEBRASKA SYMPOSIUM ON MOTIVATION (G. Melton ed. forthcoming 1986) (copy on file with the *Southern California Law Review*). See generally L. DAVIS, *THEORY OF ACTION* 107-41 (1979).

34. Grunbaum, *Free Will and Laws of Human Behavior*, in *NEW READINGS IN PHILOSOPHICAL ANALYSIS* 605, 610-12 (H. Feigl, W. Sellars & K. Lehrer eds. 1972).

35. See *supra* text accompanying notes 17-22.

follow. These are not the terms in which he makes his argument, however.

Consider the case of a person whose extreme irrationality stems from the involuntary ingestion of a powerful hallucinogen. Such a defendant, who is not responsible for the ingestion of the drug, is not held responsible for a consequent crime.³⁶ How can we distinguish this case from that of a person who commits a crime in response to motivations produced by severe mental disorder, say, a sudden command hallucination buttressed by a consistent delusional belief that the action is necessary?³⁷ Crazy defendants who are not responsible for what they are should also be excused. In both cases the defendant is excused not because the behavior was caused—all behavior is caused—but because the defendant was sufficiently irrational and was not responsible for the irrationality.

The reason we do not excuse most disadvantaged criminals (or those whose criminal behavior can be explained by powerful causes) is not because we lack sympathy for their unfortunate background or because we fail to recognize that social disadvantage is a powerful cause of crime, as it surely is.³⁸ Rather, most disadvantaged defendants are held responsible because they possess minimal rationality and are not compelled to offend. A disadvantaged defendant driven sufficiently crazy by circumstances will be excused because that defendant is crazy, not because the crazy behavior is caused and the defendant is disadvantaged. Similarly, most mentally disordered persons are held responsible for acts influenced by their disorders because they are sufficiently rational to meet the low threshold standards for responsibility.³⁹ In sum, the criteria for moral autonomy and responsibility are rationality and lack of compulsion, whereas the criterion for excuse is that the actor is nonculpably lacking either reasonable rationality or is compelled.

The other major recent attack on the insanity defense, the American Medical Association's (AMA) report recommending abolition of the "special" defense of insanity,⁴⁰ provides another instructive but confused counterargument to the defense's moral basis. The AMA's most impor-

36. MODEL PENAL CODE § 2.08(4)(a) (Proposed Official Draft 1962).

37. Assume that the actor was unable to take any advance steps to control the craziness, such as taking prescribed medication.

38. Cantwell, *The Offender*, in BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 29, 36-38 (1983).

39. Morse, *supra* note 3, at 560-90.

40. Board of Trustees, *Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony*, 251 J. A.M.A. 2967 (1984) [hereinafter cited as AMA REPORT].

tant argument is that the insanity defense undermines the moral integrity of the criminal law because it impermissibly confuses psychiatric and legal concepts.⁴¹ The AMA writes:

A defense premised on psychiatric models represents a singularly unsatisfactory, and inherently contradictory approach to the issue of accountability. . . .

The essential goal of an exculpatory test for insanity is to identify the point at which a defendant's mental condition has become so impaired that society may confidently conclude that he has lost his free will. . . . Because free will is an article of faith, rather than a concept that can be explained in medical terms, it is impossible for psychiatrists to determine whether a mental impairment has affected the defendant's capacity for voluntary choice, or caused him to commit the particular act in question. Accordingly, since models of mental illness are indeterminate in this respect, they can provide no reliable measure of responsibility.⁴²

Rather than being a persuasive argument against the moral basis of the defense, this quote exhibits a confusion about moral responsibility akin to Professor Morris' equation of causation with excuse. The AMA believes that the insanity defense confuses moral and legal concepts with medical concepts, but it is the AMA analysis that is guilty of this confusion.

The legal defense of insanity is not based on the psychiatric premise of determinism, and the essential goal of the defense is not to identify those actors who lack free will. The legal defense of insanity is based on the premise that rationality and lack of compulsion are the touchstones of moral responsibility, and the various tests seek to identify those actors who lack these attributes. The AMA correctly notes that free will cannot be explained in medical terms or identified medically, but this is entirely beside the point. Medical models cannot provide a "reliable measure of responsibility" because they are not meant to do so. The AMA errs by claiming that free will is the basis for responsibility⁴³ and that mental disorder is somehow necessarily the antithesis of free will. Free will is not the basis for responsibility, and mental disorder per se does not negate responsibility: irrationality or compulsion negate responsibility. Experts cannot help the factfinder decide if a defendant lacked free will, but they can provide behavioral evidence to help determine if the defendant was irrational or compelled. The AMA's confused argument entirely fails to undercut the moral basis for the insanity de-

41. *Id.* at 2977-78.

42. *Id.* at 2978.

43. H. FINGARETTE, *supra* note 31, at 71-81.

fense because it does not recognize and deal with the true criteria for excuse.⁴⁴

To buttress its argument, the AMA considers the case of the wildly deluded criminal who possesses full *mens rea* and concludes, in contrast to cases involving other defenses such as duress, that "[n]o clear countervailing benefit accrues to society as a consequence of the exoneration of one who intentionally kills another as a result of an insane delusion."⁴⁵ But what countervailing benefit exists in the use of duress, for example? If duress were not available as an excuse, would not all threatened actors have the greatest incentive to resist doing harm? Further, the impact of the threats on culpability could be considered at sentencing, much as the AMA is willing to consider mental disorder at sentencing. Yet the law retains a limited defense of duress because it is simply unjust to blame an actor whose harmful act was caused by overwhelming threats. Such an actor is not culpable and does not deserve to be punished. The same is true in some cases of mental disorder: fundamentally irrational harmdoers are not morally accountable.

In order to deal with cases of fundamental irrationality, the AMA admits that a "formal doctrine" of mitigation such as the Model Penal Code's "extreme mental or emotional disturbance doctrine"⁴⁶ may be necessary.⁴⁷ This doctrine is not a technical *mens rea* element, however, but is rather a form of partial insanity.⁴⁸ Even the AMA recognizes the possible moral need for a mini-insanity defense. If such a mini-defense is necessary, a full defense is also necessary in appropriate cases. Although it is possible that critics of the insanity defense such as Professor Morris and the AMA might concede that craziness can diminish responsibility somewhat, but never totally, it is difficult to imagine, and the critics do not provide, any moral argument that would support holding responsible a defendant who was wildly out of touch with reality at the time of the offense.

Finally, some critics claim that the moral argument for the insanity defense overstates the moral bases of criminal law. The AMA, for exam-

44. Moreover, the AMA admits the relevance of mental disorder to responsibility by considering disorder "a circumstance germane to the degree of responsibility." AMA REPORT, *supra* note 40, at 2978. If responsibility is a matter of degree, however, there will be cases in which it is lacking altogether. Is it just to blame and punish such persons, few though they be?

45. *Id.* at 2979.

46. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

47. AMA REPORT, *supra* note 40, at 2979.

48. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 22-24 (1984).

ple, begins its counterargument with this dubious and vague generalization: "Proponents of the insanity defense overemphasize the degree to which modern criminal law rests upon traditional moral imperatives."⁴⁹ Modern criminal law rests on mixed consequentialist and nonconsequentialist justifications, but this is hardly an argument for abolishing a fundamentally just doctrine. As long as the criminal law does have moral foundations—and these are surely far stronger than the AMA implies—core notions of blameworthiness cannot be abandoned in ascribing guilt and apportioning punishment. Moreover, to support its vague and misleading generalization, the AMA misinterprets the evolution of *mens rea* by asserting that it is based on consequentialist concerns:

As the law evolved, the requisite mental elements of the various felonies developed along divergent lines to meet exigencies and social needs that varied with each felony. Thus, *mens rea* came to acquire a technical significance—it is less indicative of a mind bent on evil-doing than an intent to do that which unduly endangers social or public interests. An insanity defense justified solely or primarily on moral grounds is an anachronism in the modern scheme of criminal administration.⁵⁰

Differences in criminal liability based on differences in *mens rea* reflect consequentialist concerns—the actor's dangerousness and need for incapacitation—but they also and equally reflect moral culpability concerns. Intentional killers are punished more harshly than negligent killers not only because they are more dangerous—indeed, they may not be—but also because they are considered more heinous. As the California Supreme Court wrote in discussing the degrees of homicide, the difference among degrees lies in the "personal turpitude" of the offender.⁵¹ If the AMA were correct, there should not be degrees of any crime. A defendant who causes proscribed harms with any culpable *mens rea* should be convicted of the unified crime, and the social tinkerers would then take account of consequential concerns at sentencing. The AMA's analysis of *mens rea* does not support its claim that the arguments for the moral bases of the insanity defense fail. Proponents of the insanity defense need not overstate the moral foundations of the criminal law to press the moral claim for the defense.

Under my view of responsibility, a critic of the insanity defense must show either (1) that the defense is never justified on fairness grounds because no disordered defendant is ever sufficiently nonculpably irra-

49. AMA REPORT, *supra* note 40, at 2977.

50. *Id.*

51. *People v. Wolff*, 61 Cal. 2d 795, 820, 394 P.2d 959, 974, 40 Cal. Rptr. 271, 286 (1964).

tional or compelled to be excused entirely, or (2) that, even if some defendants are sufficiently irrational or compelled, they are all responsible for their failure to prevent these conditions or their consequences. These showings, I submit, have not been and cannot be made. If I am correct, the fairness argument for abolition of the insanity defense fails. It is simply not just to convict and exact retributive punishment from those who are fundamentally and nonculpably irrational or compelled.⁵² Although a strong argument can be made that even the craziest persons retain a substantial degree of ability to control their craziness or other related behavior and thus could be held accountable for their actions, in the criminal justice system, where liberty and stigma are at stake, the benefit of the doubt on this issue should be given to the very crazy by retaining the insanity defense.⁵³

Despite the strong moral argument in favor of the insanity defense, many still wish to abolish it because its administration is so unsatisfactory:⁵⁴ it fails to identify accurately those who should be excused (i.e., it often does not succeed when it should and vice versa);⁵⁵ it deflects concern from the plight of the many jail and prison inmates who are disordered and need treatment; the atmosphere of insanity defense trials is often circus-like; truly decent treatment for acquittees is rarely provided; and so on. These problems and others lead some critics to believe that the moral necessity of retaining the defense is only an ivory-tower notion that is divorced from the inadequacies of the criminal justice system,

52. One can also argue for retention of the insanity defense based on the traditional nonretributive goals of the criminal justice system. People incapable of behaving rationally or controlling themselves cannot be deterred. The general deterrent and educative effects of the criminal law are not vitiated by excusing the few persons who are sufficiently irrational or lacking in self-control, because the rest of us understand that crazy people are fundamentally different in a morally relevant way and should therefore be treated differently. Indeed, the morality and force of the criminal law are bolstered if a few undeniably crazy persons who do not deserve punishment are excused. If persons acquitted by reason of insanity are dangerous, they can be incapacitated by means other than a criminal sentence served in prison. Finally, to the extent that rehabilitation is a proper goal of the criminal justice system—and there are many, including Professor Morris and me, who doubt this—this objective too can be achieved in a nonpenal environment. See N. MORRIS, *THE FUTURE OF IMPRISONMENT* 1-27 (1974).

53. For the same reasons, I argue by contrast that involuntary civil commitment of the mentally disordered should be abolished. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54, *passim* (1982).

54. See generally MYTHS AND REALITIES: A REPORT OF THE NAT'L COMM'N ON THE INSANITY DEFENSE 14-27 (1983) (administration of insanity defense is unsatisfactory, but it should be retained and reformed) [hereinafter cited as MYTHS AND REALITIES].

55. E.g., N. MORRIS, *supra* note 3, at 63-64. There is no hard evidence to prove this, although it is the claim of many. This claim is often made because the claimant assumes explicitly or implicitly that most mentally disordered criminals are legally insane or that the purpose of the insanity defense is or should be treatment.

from the ambivalence with which society views crazy criminals, and from the consequent vengeance and neglect so often visited on those who are acquitted by reason of insanity.⁵⁶ Such critics believe that it is more immoral to retain the defense than to abandon it because administration of the insanity defense is and must be itself immoral.

The abolitionist sentiment that admits the moral bases for the defense but despairs of its ever being properly employed is understandable but must be resisted. Abolishing the insanity defense will not measurably improve the efficiency and honesty of the criminal justice system, nor will it lead to enhanced social safety. Rather, it is an admission of moral exhaustion that will lead to further disrespect for the notion that persons must be treated seriously as moral agents. Only by recognizing that there are limits to moral agency can our society remain clear about what it means to be responsible for one's actions. The energy used to promote abolition should be rechanneled into reform. No set of reforms will probably ever be completely successful in this area because of our mixed feelings about crazy criminals. But if the moral integrity of the criminal law is to be protected, the insanity defense must be retained.

II. INSUBSTANTIAL OBJECTIONS TO THE INSANITY DEFENSE

There are a number of objections to the insanity defense that I believe are insubstantial. That is, either they are based on false empirical assumptions and incorrect logic or they prove too much and thus fail to provide objections specific to the insanity defense. These objections are raised frequently, however, and their proponents believe they have force, so they must be addressed. These objections to the insanity defense, which I shall discuss in order, are: (1) it produces "wrong" verdicts; (2) defendants use it to "beat the rap"; (3) it deflects attention and resources from the treatment needs of the disordered persons in jail and prison who did not raise or failed with the defense; (4) it is a historical accident; (5) it is a "rich person's defense"; (6) it is used too infrequently to justify retaining it; and (7) it requires an assessment of the defendant's past mental state, a task that is too difficult.

A. THE INSANITY DEFENSE PRODUCES "WRONG" VERDICTS

Unlike many other criteria for criminal liability, the insanity defense tests do not raise strictly factual questions. Rather, the judgment made

56. *Id.* at 63-64, 72-74.

about the defendant's mental state at the time of the crime is primarily a legal, moral, and social judgment. For example, whether the defendant fired the fatal bullet and intended to kill the victim, thus satisfying the elements of murder, are factual questions with determinate, albeit often difficult to determine, answers. By contrast, the insanity defense tests ask indeterminate questions, such as how much lack of knowledge of right and wrong or how much lack of capacity to conform one's conduct to the law a defendant must have in order to be acquitted. Of course, the legal judgment must be based on facts, but the legal test is not itself factual. The insanity defense tests prescribe the relevant behavioral continuum, but drawing the line between guilt and innocence is the task of the factfinder as the moral representative of the community. Except at the extremes, there are rarely determinate answers to such moral questions.⁵⁷

If there is no substantial error in the presentation of the evidence or the instructions to the jury, most insanity verdicts are presumptively reasonable.⁵⁸ The question is one of applying community standards in light of legal precedents and there are few determinate, objectively correct, clear cases that reach the jury. The factfinder may be swayed by prejudice, or may willfully refuse to apply the test properly in the rare clear case, but this is possible with all indeterminate, morally-based criteria, and there is no reason to believe it happens disproportionately often in insanity defense cases. Moreover, even if it could be said that an insanity verdict is wrong in some ultimate, objective sense, "wrong" verdicts are possible in all areas of law, but they do not always lead to intemperate attempts to change fundamentally just laws. For instance, juries must occasionally acquit defendants claiming the indeterminate justification of self-defense because jurors wrongly accept the defendants' false claims that they honestly and reasonably believed their lives were in danger, yet no one consequently calls for the abolition of self-defense as a defense. Furthermore, even if insanity defense verdicts can be objectively wrong, again there is no reason to believe this occurs disproportionately often with this particular defense. The wrong or unpopular verdict argument is far too weak conceptually and proves far too much to be a legitimate reason for abolishing the insanity defense.

57. Of course, the insanity defense is not the only indeterminate criminal law criterion that must be adjudicated in light of the community's moral and social values. Questions of causation and "reasonableness" are similarly indeterminate.

58. Another possibility is that jurors do not understand insanity defense instructions, but these instructions are surely no more incomprehensible than instructions on a host of other issues. See generally Sales, Elwork & Alfini, *Improving Comprehension for Jury Instructions*, in 1 PERSPECTIVES IN LAW AND PSYCHOLOGY: THE CRIMINAL JUSTICE SYSTEM 23 (B. Sales ed. 1977) (jury incomprehension is often due to linguistic difficulties inherent in jury instructions).

B. INSANITY DEFENDANTS "BEAT THE RAP"

Few defendants "beat the rap" with the insanity defense. There are little hard data for this claim, but it is best estimated that the insanity defense is raised in fewer than two percent of federal and state trials and is rarely successful.⁵⁹ The complaint that this defense allows large numbers of criminals to avoid conviction and punishment is simply unfounded.⁶⁰ Prosecutors and defense attorneys generally recognize that insanity is a defense of last resort that betokens an otherwise weak defense and that rarely succeeds. Even those jurisdictions with the broadest insanity defenses do not have a substantial number of acquittals. Insanity acquittals are far too infrequent to communicate the message that the criminal justice system is "soft" or fails to protect society.⁶¹ It is impossible to measure precisely the symbolic value of these acquittals, but it is also hard to believe that they have much impact on social or individual perceptions. So few insanity pleas succeed that neither aspiring criminals nor society assume that conviction and punishment will be averted by raising the defense.

C. THE INSANITY DEFENSE DEFLECTS ATTENTION FROM THE NEEDS OF DISORDERED JAIL AND PRISON INMATES

I do not believe that the existence of the insanity defense deflects attention from the condition and the needs of the many disordered persons in jail and prison who do not raise or fail with the defense.⁶² Mental health (and other medical) services in jails and prisons are admittedly

59. MYTHS AND REALITIES, *supra* note 54, at 14-15; Pasewark, *Insanity Pleas: A Review of the Research Literature*, 9 J. PSYCHIATRY & LAW 357, 361-66 (1981). In Great Britain, the use of the insanity defense has been called "virtually obsolete." S. DELL, MURDER INTO MANSLAUGHTER 53 (1984). This has occurred primarily because of both the difficulties in proving insanity and the inflexibly harsh dispositional consequences that ensue if the defendant succeeds with the plea.

60. Pasewark, *supra* note 59, at 361-66. Indeed, one might even argue that, although few defendants deserve an excuse on the ground of insanity, actually too few insanity defenses succeed because jurors fear those who commit particularly heinous acts or distrust the insanity defense. On the other hand, clear cases in which the defense is undeniably justified rarely go to trial. Instead, the prosecution accedes to the insanity plea prior to trial, and commitment ensues. MYTHS AND REALITIES, *supra* note 54, at 23-24.

61. See S. DELL, *supra* note 59; MYTHS AND REALITIES, *supra* note 54; Pasewark, *supra* note 59.

62. The prevalence rate of psychosis is the same for inmate and class-matched community populations; there is no consistent evidence that the prevalence of nonpsychotic disorders differs. Monahan & Steadman, *Crime and Mental Disorder: An Epidemiological Approach*, in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 145, 168-69 (M. Tonry & N. Morris eds. 1983).

insufficient to meet the needs of disordered inmates.⁶³ Nevertheless, it is unimaginable that the neglect of this population stems in whole or in substantial part from the existence of the insanity defense and the attention it receives. Substandard and too often inhumane jail and prison conditions exist because society believes that criminals deserve fewer resources than other claimants. Providing decent mental health services to inmates will require a legislative act of political will that will itself depend on massive transformations of legislative attitudes towards prisoners. I believe it is cynical or naive to suggest that abolition of the insanity defense will have any appreciable effect on jail and prison services. Indeed, if abolition has any effect at all, it may be the opposite: without the insanity defense, the plight of disordered persons in the criminal justice system may become even less visible than it is today.⁶⁴ Furthermore, legislatures may think it unnecessary to provide substantial mental health services to those who are justly held responsible, as would always be the case if the insanity defense were abolished.

D. THE INSANITY DEFENSE IS AN HISTORICAL ACCIDENT

Some critics try to demonstrate that the insanity defense is an historical accident and thus does not deserve the veneration it receives.⁶⁵ Although I believe the historical evidence supports retention of the defense, its history is irrelevant in determining if the defense is morally necessary and practically workable: only moral and practical counter-arguments can defeat moral and practical arguments for the existence of the defense. Our ancestors' beliefs about the defense are not arguments either for or against retaining the defense. The place of insanity and its manner of adjudication in the past criminal process is not dispositive of what its place *should be* and whether it can be workable today.

E. INSANITY IS A RICH PERSON'S DEFENSE

It is also often claimed that insanity is a rich person's defense—the Hinckley verdict is a particularly popular example—but this claim proves too much. Wealthier defendants can almost always retain the

63. See U.S. GENERAL ACCOUNTING OFFICE, JAIL INMATES' MENTAL HEALTH CARE NEGLECTED: STATE AND FEDERAL ATTENTION NEEDED *passim* (1980).

64. It is also possible that the number of disordered persons in the criminal justice system has increased or is increasing because of the decreased use of mental hospitalization. Teplin, *The Criminalization of the Mentally Ill: Speculation in Search of Data*, 94 PSYCHOLOGICAL BULL. 54, 55-64 (1983).

65. See N. MORRIS, *supra* note 3, at 54-59.

best attorneys and experts in all types of cases, both civil and criminal.⁶⁶ Although this economic reality may be especially disquieting in the criminal justice system where liberty and stigma are at stake, it is no more problematic in insanity defense trials than in other criminal cases. Abolishing the insanity defense would not abolish the inequities of the criminal justice system admittedly caused by financial inequality. In any case, probably only a few rich defendants raise the insanity defense,⁶⁷ and, as noted above, few defendants of any economic status succeed with it.

Overall, the better solution is systemic: reasonable attempts must be made to ensure all defendants decent representation. All defendants with a credible claim for the defense must be given a reasonable opportunity to pursue the defense properly by providing them with qualified experts and other necessary resources.⁶⁸ Insanity defense cases can be expensive, but these costs should not be prohibitive if the number of defendants who raise the defense is small. This result depends, of course, on refining the test for insanity so that it is limited to those few defendants who might fairly be excused. Of course, if the test adopted were broad, a large number of defendants might try to raise the defense and the costs of adjudication would consequently rise substantially. If the defense is morally required, however, society must be willing to bear the costs of its fair adjudication.

F. THE INSANITY DEFENSE IS RAISED TOO INFREQUENTLY TO BE WORTH THE TROUBLE

One might argue that the insanity defense is raised too infrequently to be worth the trouble it causes. But other defenses such as duress and necessity are also raised infrequently and are also difficult to "adjudicate." If a defense is morally required then it should be retained, even if only a few defendants qualify for it. Because it is unfair to punish those who are legally insane, society should bear the cost of avoiding such injustice.

66. In contrast, Henry Steadman's study on competence to stand trial in New York State found that public defenders, who were more experienced in handling such matters, represented defendants better than did higher priced, private attorneys, H. STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL 49-50 (1979). One wonders if this might not be true of the insanity defense as well, except, perhaps, in the case of those few private criminal defense attorneys who have substantial experience with the defense.

67. Hawkins & Pasewark, *Characteristics of Persons Utilizing the Insanity Plea*, 53 PSYCHOLOGICAL REP. 191, 194 (1983); Pasewark, *supra* note 59, at 368-69.

68. The Supreme Court has decided that the state cannot refuse to provide an indigent defendant who raised the insanity defense with a psychiatric report to help him prepare his defense and claims for mitigation in sentencing. *Ake v. Oklahoma*, 53 U.S.L.W. 4179, 4183 (1985).

G. PAST MENTAL STATES CANNOT BE DETERMINED

Some critics argue that the insanity defense is unworkable because neither experts nor laypersons can reconstruct the defendant's mental state at the time of the crime; it is too hard to enter the mind of another, especially when considering past events.⁶⁹ Consequently the usual prescription is to consider the defendant's mental disorder only at the time of sentencing. This argument proves too much. If these critics concede, as almost all do, the necessity of proving *mens rea* (for most crimes) before punishment may justly be imposed, then their argument against the insanity defense must fail unless assessing past intent, knowledge, and other types of *mens rea* is easier than assessing past craziness. After all, both *mens rea* and legal insanity refer to past mental states that must be inferred from the defendant's actions, including utterances. Indeed, one could claim that the extreme craziness that I deem necessary to support an insanity defense is easier to prove than ordinary *mens rea* because it is, by definition, obvious. Moreover, if sentencing is based in part on desert, then the defendant's responsibility, based on mental state at the time of the crime, must be assessed.⁷⁰

Some abolitionist critics take their arguments about proving *mens rea* to even greater extremes. They lament the criminal law's concern with *mens rea* as well as with legal insanity. For them, the law should take account only of the defendant's dangerousness and our ability to train, treat, or educate persons to behave properly in the future.⁷¹ With all due respect, these radical critics are confused. Although it is admittedly difficult to determine the mental state of another, it is nevertheless utterly necessary to make moral judgments about the actor. Both the law and lay judgments individuate an actor's culpability according to the mental states that accompany actions. In moral terms, there is an immense difference between inflicting an injury intentionally and inflicting it by accident. Any parent disciplining a child knows that deeds committed "on purpose" and those committed by mistake require different pa-

69. See H. FINGARETTE, *supra* note 31, at 81-84; W. WINSLADE & J. ROSS, *THE INSANITY PLEA* 8-12 (1983).

70. One of the amusing inconsistencies among opponents of psychiatric excuses is the conflict about whether it is harder to prove insanity or the negation of *mens rea*. Those who wish to avoid the use of psychiatric testimony to negate *mens rea* claim that it is much harder to prove *mens rea* negation than insanity. Critics of the insanity defense claim the opposite, of course. The truth is that they are equally easy (or difficult) to prove, but, if there is any difference, it is probably somewhat easier to adjudicate insanity. In any event, since fundamental fairness requires that the defendant be allowed to try to negate *mens rea* and to raise the insanity defense, the difficulties with reconstructing past mental states are simply part of the cost of being fair.

71. B. WOOTTON, *supra* note 7, at 51-53.

rental responses. For the same reason, actors who commit crimes intentionally are considered more culpable and are punished more harshly than those who cause the same harms recklessly or negligently. Unless one wishes the law to stop treating persons as persons—as beings deserving of praise and blame—and wishes the law, instead, to treat them as machines that need only be adjusted, criticism of the law's assessment of mental states is misguided. Even if such a dehumanizing scheme were coherent and workable, however, this is not the theory of criminal justice that the opponents of the insanity defense adopt.

III. ALTERNATIVES TO ABOLISHING THE INSANITY DEFENSE

Some critics concede the moral point that legal recognition of craziness is important, but believe that this can be accomplished without maintaining a separate defense of insanity. In this Part of the Article, I argue that the primary suggestions for accomplishing this goal—the “elements” (*mens rea*) approach, sentencing discretion, and the guilty but mentally ill verdict (GBMI)—are misguided. Finally, I suggest that abolition is probably constitutional today, but should not be.

A. THE “ELEMENTS” APPROACH

Those who believe that responsibility can be considered primarily within the confines of the state's *prima facie* case argue that volitional and cognitive consequences of mental disorder can fairly be handled by the *actus reus* and *mens rea* doctrines. This ignores the true effects of mental disorder on behavior, however. As a factual matter, mental disorder, even of the extreme variety, rarely negates the requirements of an act and appropriate mental state.⁷² Disordered persons are not automatons. Unlike sleepwalkers or persons acting reflexively who lack the *actus reus* for the crime, disordered persons' acts are willed even if they are the result of crazy reasons or compulsion. Moreover, virtually all crazy persons know, in the strictest sense, what they are doing and intend

72. There are no hard data with which to prove this claim. Rather, my experience as a consultant and my examination of the reported cases lead to the conclusion that the statement is accurate. I have discussed the issues in detail elsewhere. Morse, *supra* note 48, at 40-42. One of the rare exceptions that proves the rule is *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978), in which a disordered defendant charged with burglary claimed that he believed he had broken into his own apartment. If he was not shamming—and I believe there is considerable reason to believe that he was—the defendant lacked the *mens rea* for burglary: he did not intend unlawfully to enter the dwelling of another or to commit a felony (e.g., theft—depriving *another* permanently of property) therein.

to do it. A person who kills another because of a delusional belief is aware of killing a human being and does so intentionally. If such a person is to be acquitted, it must be because of an excuse, not because the state has no *prima facie* case. Crazy defendants rarely if ever lack *mens rea* because they believe (to use the Model Penal Code's silly example) that they are squeezing a lemon rather than killing a person.⁷³

Other doctrines of excuse or justification such as duress, mistake, or self-defense will not help either. These excuses will typically be irrelevant, or, if relevant, will succeed only if acted on reasonably.⁷⁴ For instance, the traditional excuse of duress will not be available to a defendant who killed another acting upon a delusional belief because there is no threat by another person. Mistake, too, will typically be irrelevant because the type of mistake produced by mental disorder usually involves the defendant's motive instead of negating *mens rea*. Finally, where the crazy person's belief is relevant, it is, by definition, unreasonable. Moreover, it is not the product of negligence, but rather of apparently uncontrollable, albeit largely unidentified, factors. In most cases, the *actus reus* and *mens rea* doctrines and defenses other than insanity will fail to excuse even the craziest defendant.

Unless one confuses *mens rea* with general responsibility,⁷⁵ some mentally disordered persons can be treated justly only by a criminal justice system that has a defense of insanity. A person who kills because of a delusional belief that to do so will produce peace on earth, kills intentionally and probably premeditatedly and has no defense but insanity to a murder charge. Nevertheless, the killing is fundamentally irrational; the person is apparently incapable of behaving rationally in the context in which the delusion operates. A person who kills because of the delusional belief that it is necessary to do so to save one's own life kills intentionally and will not succeed with the defense of self-defense. That person may be guilty only of negligent or reckless homicide, but such a verdict is not responsive to the moral character of the killing. Such a person is not properly viewed as a negligent or reckless killer who should be convicted of a risk-creation type of homicide, but is rather a crazy actor who ought to be excused. The immorality of convicting such persons of some degree of homicide can be avoided only by an insanity de-

73. MODEL PENAL CODE § 4.01 comment 156 (Tent. Draft No. 4, 1955).

74. E.g., W. LAFAYE & A. SCOTT, *supra* note 11, at 376 (duress); *id.* at 393 (self-defense).

75. For the distinction between "special *mens rea*" (the definitional mental elements of a crime that are part of the prosecution's *prima facie* case) and "general *mens rea*" (responsibility in general), see S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 20, at 267-68.

fense and not, as proponents of the elements approach claim, by lenient punishment.

B. SENTENCING DISCRETION

A related suggestion for considering mental disorder without retaining the insanity defense—sentencing discretion—also misses the moral point for many of the same reasons already addressed. If a person's craziness so influences the offense that a complete excuse is appropriate, it makes little sense to hold the person responsible, to convict the person as a morally culpable wrongdoer, but then to avoid all penal sanction because the person does not deserve punishment.⁷⁶ Taking account at sentencing of extreme mental disorder that would otherwise excuse entirely is sensible only if, first, the insanity defense can justly be abolished because no defendant should be entirely excused as a result of the consequences of mental disorder, and, second, one can construct a nonarbitrary and reasonable sentencing scheme that reflects the impact of mental disorder. The latter is unlikely because we lack coherent principles finely to calibrate mental disorder to culpability.⁷⁷ And, again, once it is admitted that mental disorder can affect responsibility for purposes of mitigation in sentencing, why is it unacceptable to claim that in some cases it can excuse entirely?⁷⁸

C. GUILTY BUT MENTALLY ILL

Moral and practical considerations also demonstrate the illogic of the currently popular and vaunted⁷⁹ suggestions for a "guilty but men-

76. Perhaps the most famous analogous example is the notorious British case of survival cannibalism on the high seas, *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884). There it was clear that the British authorities wished to secure a conviction for murder in order to uphold a principle, but at the same time wished to insure that the defendants did not suffer severe punishment. A. SIMPSON, *CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE* 79, 195-96, 199-200, 204 (1984). The defendants were convicted of murder and sentenced to death as the law required, *id.* at 239, but after much consideration the sentence was commuted to six months imprisonment, but not at hard labor. *Id.* at 240-47.

77. See Morse, *Justice, Mercy and Craziness*, 36 *STAN. L. REV.* 1485, 1497-1501, 1503-07 (1984).

78. Even the AMA admits that a special defense might be necessary in a few cases and that mental disorder is relevant to sentencing. See *supra* notes 46-48 and accompanying text.

79. E.g., MICH. COMP. LAWS ANN. § 768.36 (West 1982). See generally Note, *The Guilty but Mentally Ill Verdict and Due Process*, 92 *YALE L.J.* 475 (1983) (arguing that GBMI verdict both "lacks protections normally associated with the exercise of state power" and implicates several constitutionally derived rights). This verdict is usually adopted in addition to the insanity defense, not as a substitute.

tally ill" (GBMI) verdict. If the point of this verdict is to assure that persons who are mentally disordered at the time of conviction receive treatment, then it is unobjectionable, albeit unnecessary. Is the verdict "guilty but herpes" sensible or necessary to ensure the medical treatment of inmates suffering from herpes? Even without a special verdict, simple humanity and the federal Constitution⁸⁰ require that all prisoners who are ill—whether physically or mentally—must receive minimally adequate treatment. A jury verdict is not the appropriate means to reach diagnoses or to insure treatment.

If, on the other hand, the purpose of the GBMI verdict is to insure punishment of nonresponsible persons, then it is morally objectionable. Societal concern about releasing dangerous, disordered defendants should not be assuaged by convicting those who do not deserve conviction. Rather, persons who were fundamentally crazy at the time of their crimes should be acquitted by reason of insanity, and societal safety should be insured by rational postacquittal procedures. It makes no sense to sentence a crazy defendant to a term based on culpability when the defendant is not culpable. If the defendant is culpable, a simple guilty verdict is appropriate.

Furthermore, the GBMI verdict may encourage jurors who believe a defendant is legally insane but who dislike or distrust the insanity defense to compromise on an improper GBMI verdict. They may rationalize to themselves that the GBMI defendant will receive treatment, but not all GBMI statutes mandate treatment and currently available evidence indicates that GBMI defendants do not receive adequate treatment.⁸¹ GBMI thus creates the potential of unfair verdicts without yielding dependable benefits, benefits that a rational and humane system could provide without it. Finally, if, as some critics claim, the insanity defense confuses juries, then, a fortiori, a combination of the insanity defense and GBMI will prove even more confusing. And, of course, adoption of GBMI to replace the insanity defense is unacceptable for the reasons given in Part I of this Article.

D. THE CONSTITUTIONALITY OF ABOLISHING THE INSANITY DEFENSE

Before addressing the necessary practical reforms of the insanity de-

80. See *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982); *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976).

81. See Smith & Hall, *Evaluating Michigan's Guilty but Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J. L. REF. 77, 104-05 (1982).

fense, we must consider whether abolition of the insanity defense would be constitutional under the due process clause of the fourteenth amendment. The Supreme Court has not addressed the issue directly and some older state cases held that it was not,⁸² but the most recent state case held that abolition of the defense is constitutional.⁸³ It is generally conceded that substantive due process requires the presence of *mens rea* before criminal punishment may be imposed for nonregulatory offenses;⁸⁴ therefore, most persons who assume abolition is unconstitutional believe, incorrectly I think, that insanity negates *mens rea*.

Fully analyzing these issues goes far beyond the purpose of this Article, but even a cursory review reveals that abolition is almost certainly constitutional under current federal constitutional doctrine. The Supreme Court has been unwilling to announce a general constitutional doctrine of responsibility, and thus to require a finding of moral culpability before punishment may be imposed.⁸⁵ And in *Patterson v. New York*,⁸⁶ Justice Powell noted in dissent that it would be constitutional for a state to abolish the distinction between murder and manslaughter that is predicated on the provocation/passion formula.⁸⁷ This distinction is one of the oldest in the criminal law, and most would agree that a person who kills in the heat of passion on legally adequate provocation is less culpable than a person who kills coolly and premeditatedly.⁸⁸ Nevertheless, obliterating the distinction and convicting all intentional killers of the same degree of homicide appears to be within the substantive police power of a state. Similarly, although the insanity defense is ancient and based on moral principles, its existence as a separate affirmative defense appears to be purely a matter of legislative grace and is not compelled by due process.

A powerful argument that it would be unconstitutional to punish a fundamentally blameless person for serious crimes could be constructed based on the eighth and fourteenth amendments, but I believe that such

82. E.g., *State v. Strasburg*, 60 Wash. 106, 110 P.2d 1020 (1910) (legislature denies the accused's constitutional right to due process if it denies the opportunity to present evidence of insanity to the jury).

83. *State v. Korell*, 690 P.2d 993, 998-1002 (Mont. 1984).

84. See Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1371-76 (1979).

85. *Powell v. Texas*, 392 U.S. 514, 544-46 (1968).

86. 432 U.S. 197 (1977).

87. *Id.* at 228 (Powell, J., dissenting). I assume that if the dissent made this statement in a case that was decided "conservatively," it would not be hard to muster a majority for the constitutionality of this position today.

88. I do not agree with this, however. See Morse, *supra* note 48, at 33-34.

an argument, although correct, would fail today. Although it would probably be unconstitutional to abolish all *mens rea* requirements for crimes carrying substantial penalties, under current constitutional law an affirmative defense such as insanity can be abandoned if a state legislature so decides. Nevertheless, it would be a moral error and a grave injustice to abolish the insanity defense. It ought to be unconstitutional to abolish the defense, even if the Supreme Court would not so hold today.

IV. REFORMING THE INSANITY DEFENSE

Although many of the objections to the insanity defense have little merit and the alternatives are unacceptable, the current substance of and complex procedures accompanying the insanity defense do present substantial problems that must be addressed. Arguing that an insanity defense is morally required does nothing to rebut the criticisms of the undoubted abuses of the defense. I believe these practical objections are the real source of discontent. The issues for consideration here are whether insanity defense trials can be conducted rationally and whether the reasonable safety of society and the proper treatment of the insanity acquittee can be accomplished.

Many claim that the abuses of the insanity defense and its dangers to society are inherent and that no amount of reform can ameliorate the problems. They conclude that the practical evils of the defense outweigh its theoretical justice, and thus the defense should be abolished. I conclude, by contrast, that thorough substantive and procedural reforms can yield a limited but just insanity defense and that the moral imperative of the defense requires that we attempt reform. The criteria for the defense, the role of mental health experts, the burden of persuasion, and postacquittal problems are the issues requiring attention.

A. DEVELOPING A REASONABLE AND WORKABLE TEST FOR LEGAL INSANITY

The insanity defense excuses a defendant who suffers from either a cognitive or a volitional disability because of mental disorder. For instance, *M'Naghten*⁸⁹ jurisdictions define legal insanity cognitively: the failure to know either right from wrong or the nature of one's act. Juris-

89. *Daniel M'Naghten's Case*, 8 Eng. Rep. 718 (1843). As Richard Moran has conclusively shown, the correct spelling of the defendant's name is McNaughtan. R. MORAN, *KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN* xi-xiii (1981). To avoid confusion, however, I shall use the spelling of the official report of the case.

dictions that also adopt the "irresistible impulse" test additionally define legal insanity volitionally: a condition whereby the defendant's acts are caused by an uncontrollable impulse. The American Law Institute's (ALI) test combines cognitive and volitional variants of the *M'Naghten* and irresistible impulse tests: does the defendant lack substantial capacity either to appreciate the criminality (wrongfulness) of actions or to conform conduct to law? We have seen that these tests generally track the moral bases of responsibility.⁹⁰

The task at hand is to construct a test that asks the right question and that excuses only those defendants who are beyond the pale of responsibility. Whatever the criteria for responsibility, they cannot be quantitatively and determinately defined. The definition and assessment of any degree of rationality and compulsion are too fuzzy and subjective to permit even the illusion of precision. The criteria for responsibility should not be amorphous, but neither can they be rigidly specific. No matter how tightly the insanity defense is drawn, however, there may be some "wrong" verdicts—the test will sometimes fail to identify accurately those who ought to be acquitted or convicted.⁹¹ But again, this is possible with all criminal defenses. The risk of improper verdicts should not cause us to reject a defense that is morally just and that can be written so as to minimize this risk. If the test used makes a difference in the outcomes of insanity defense trials,⁹² the approach suggested here would reverse the trend towards broader criteria⁹³ by narrowing the defense considerably and reducing the risk of improper verdicts.⁹⁴

1. *The Definition of Mental Disorder*

A test for legal insanity should not excuse all those who suffer from mental disorder in general, particular disorders, or mental disorders of

90. See *supra* notes 10-13 and accompanying text.

91. See *supra* text accompanying notes 57-58.

92. There is reason to doubt that it does because some simulation research and other direct evidence seem to indicate that varying the test used may not affect jury outcomes. Pasewark, *supra* note 59, at 385-90 (reviewing all the research literature).

93. This trend is exemplified by the legislative or judicial adoption of the broader ALI standards in several state and federal courts. See, e.g., VT. STAT. ANN. tit. 13 §§ 4801-4802 (1958).

94. Throughout this Article, I assume that only a few defendants deserve to be acquitted by reason of insanity and that the law should adopt standards and procedures to satisfy this assumption. This is, of course, a normative assumption that reflects my view that the standards for responsibility should be very strict and that it is fair to hold most persons fully accountable for their wrongdoing. Nothing in the general moral, social, and legal analysis of this Article entails that assumption, however. One who accepts my analysis of the moral bases of the insanity defense might very well believe that the defense should be more generous and that the law should adopt standards and procedures consonant with this belief.

particular severity. It should excuse only those actors who are so irrational, so crazy, so out of touch with reality that they do not deserve conviction.⁹⁵ The legal test should inform the factfinder, using common sense and reasonably understandable terms, what behavior the law has identified as sufficiently crazy to warrant excuse.⁹⁶ The terms "mental disease or defect" do not do this: they are too broad and vague to guide the factfinder.

Some have tried to formulate legal definitions for the terms "mental disease or defect."⁹⁷ I suggest that some such definition should entirely replace the mental disease or defect criterion and become the criterion itself rather than simply a definition of it. If the legal definition of "mental disease or defect" is the functional equivalent of these terms as they are used in the insanity defense test—and it is an equivalent by definition—nothing is lost by my suggestion and much will be gained. I shall therefore propose specific language to achieve these goals and suggest the virtues of such language. In a spirit of fraternity with the American Psychiatric Association, I shall use, with minor modifications, the definition suggested in its *Statement on the Insanity Defense*.⁹⁸

95. My preferred test would use exactly language of this type. See *infra* subsection accompanying note 130.

96. The defendant's conduct must of course satisfy the other elements of the test as well.

97. The most famous attempt to provide such a legal definition took place after the Court of Appeals for the District of Columbia rendered its famous decision in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). *Durham* held that an "accused is not criminally responsible if his unlawful act was the product of mental disease or defect." *Id.* at 874-75. The breadth of the term "mental disease" led to confusion, however, because the court clearly did not mean to excuse every defendant whose act might have been influenced by any mental disorder. After years of unfortunate experience with *Durham's* vague standard, the court of appeals finally adopted a legal standard in *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962): "[a] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." *Id.* at 851. Although this formulation looks more precise, it is still vague and tautological: a mental disease is an abnormality that affects the mind, emotions, or behavior. Of course, what else could it be?

More recently, the American Psychiatric Association has suggested another definition for legal purposes that was first proposed by Professor Richard J. Bonnie of the University of Virginia School of Law. AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE 11-12 (1982) (citing Bonnie, A Model Statute on the Insanity Defense (1982) (available at Institute of Law, Psychiatry and Public Policy, University of Virginia)) [hereinafter cited as STATEMENT ON THE INSANITY DEFENSE]; see Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 197 (1983). This definition is set forth and discussed *infra* at notes 98-99 and accompanying text.

98. A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense. As used in this standard, the terms mental disease or mental retardation include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances.

STATEMENT ON THE INSANITY DEFENSE, *supra* note 97, at 12.

The better test would be this:

It is a defense to a prosecution for an offense that, at the time of the conduct alleged to constitute the offense, the defendant's perception and understanding of reality was grossly and demonstrably impaired and, as a result of that impairment, the defendant did not . . . [cognitive and/or volitional criteria].

The first advantage of this definition is that it is an entirely legal test that uses ordinary descriptive language that can be understood by judges and jurors. Although mental health professionals are concerned in medical or psychological contexts with gross impairment in reality testing, there is nothing necessarily technical about the phrase, "perception and understanding of reality was grossly and demonstrably impaired." The test informs the factfinder directly and without using jargon that the law excuses only those who were really "out of it" at the time. A second advantage is that the language is unconfusing. Although words like "grossly" and "demonstrably" are open to interpretation, and absolute precision is unachievable, the proposed test instructs the factfinder that the person must be out of touch with reality in a major and obvious way.

Third, this test obviates the need for the "caveat" paragraph of tests such as the ALI formulation, which provides that the mental disorder criterion does not include the antisocial personality.⁹⁹ The antisocial persons contemplated by such caveat language are not out of touch with reality and are therefore not included within my proposed definition of those who might be excused. Fourth, the proposed test will help reduce futile and irrelevant testimony about diagnosis. The test helps clarify that the moral and legal issue is the defendant's impairment of contact with reality, not the psychological or psychiatric diagnosis of the defendant.

Fifth, and perhaps most importantly, the new test sets the proper moral standard for an excuse on the ground of insanity. It would be very hard to argue that a person was legally responsible and deserved to be punished if that person's perception and understanding of reality were so grossly and demonstrably impaired, that the additional cognitive or volitional requirements of the test were satisfied. Similarly, persons reasonably in touch with reality do not deserve to be excused for their heinous deeds. Thus, the proposed test correctly identifies the issue and does so justly.

99. MODEL PENAL CODE § 4.01(2) (Proposed Official Draft 1962).

2. *The Cognitive Test*

Let us next consider the cognitive branch of an insanity defense. Although it is difficult to determine whether a defendant actually knew either the rules governing conduct or the nature and quality of the act, this determination is possible in principle. The proper question is, what type of lack of knowledge caused by mental disorder should excuse. In most cases, defendants will have general intellectual knowledge of the legal and moral rules governing conduct, but because of crazy thoughts or perceptions (e.g., delusions or hallucinations), will irrationally misconceive the moral nature of their actions. For instance, a defendant who kills someone because of a delusional belief that the Lord commanded the action in order to save the world, knows that killing is usually both a moral and legal wrong, and is intentionally killing a human being. Because the defendant has knowledge of the general rules and, in a narrow sense, of what he is doing, many critics of the insanity defense claim that such a person should be convicted of murder.¹⁰⁰ Such a defendant's craziness affects only motivation to commit the crime, and it is criminal law boilerplate that motivation is irrelevant to criminal guilt (although it may be considered at sentencing).

Even if the crazy defendant in our example is narrowly aware that he is killing a human being, he is fundamentally and irrationally mistaken about the morally relevant facts. It is morally and legally insufficient to consider this type of defendant's responsibility without regard to perceptions and reasons for acting based on those perceptions.¹⁰¹ Persons whose total understanding of what they are doing is gravely (and nonculpably) impaired are not as responsible as those who understand or are capable of understanding the morally relevant facts. Rationality, the precondition for moral responsibility, is lacking in our example.

At this point it may seem that I am using the defendant's motive to excuse. Although motives do not negate the elements of a crime, they are legally relevant for affirmative defenses (and for making inferences

100. See, e.g., Smith, *supra* note 3 (outlining the position of the author, William French Smith, former U.S. Attorney General). The Administration's position has since softened, however. President Reagan has signed new federal criminal legislation which does provide for a limited insanity defense. See The Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, §§ 401-406, U.S. CODE CONG. & AD. NEWS (98 Stat.) 2057-68.

101. Sir James Fitzjames Stephen has provided the most pithy counterassertion:

My own opinion, however, is that if a special Divine order were given to a man to commit murder, I should certainly hang him for it unless I got a special Divine order not to hang him. What the effect of getting such an order would be is a question difficult for anyone to answer till he gets it.

J. STEPHEN, 2 HISTORY OF THE CRIMINAL LAW OF ENGLAND 160 n.1 (1883).

about the presence of required *mens rea*). In a sense, defendants alleging duress assert an excusing motive for their actions: they intended to commit their crimes with full knowledge of what they were doing, but claim that the reason they offended—the threats—should excuse them. Similarly, defendants claiming insanity contend that their motives are evidence of fundamental irrationality regarding crucial, morally relevant aspects of their behavior. It must be remembered that, except in rare cases, mental disorder does not negate *mens rea* and thereby does not defeat the prosecution's *prima facie* case.¹⁰² Insanity is an affirmative defense whereby defendants usually admit the elements of the crimes, but claim an excuse based on an irrational misperception, belief, or impulse. In the rare cases in which mental disorder negates *mens rea*, it should not be seen as a separate defense; rather the mental disorder should lead directly to an acquittal because it defeats the *prima facie* case.¹⁰³

The difficult task is to craft a cognitive test for legal insanity that excuses those who are fundamentally irrational without allowing spurious claims to succeed. The language of the cognitive test must insure that the factfinder understands the test is applicable only to a person whose moral perception of the context in which the crime is committed is fundamentally and irrationally mistaken. The test should excuse the delusional defendant described above, even if he knew he was killing a human being.

The Hinckley case illustrates this approach. Whether Hinckley should have been excused depends on the conceptualization of his motivation for attempting to assassinate President Reagan. Was he an unhappy and misguided but nonetheless minimally rational young man who tried in a twisted way to obtain the love and attention he desired? Or was he a wildly deluded individual who was grossly out of touch with reality, whose actions were an attempt to live out his delusions? Did he really believe that if he shot the President he would somehow obtain Jody Foster's love? I did not examine Hinckley and was not present at the trial, so it would be inappropriate for me to offer a view on the verdict. It seems clear, however, that if the latter conceptualization of his reasons is apt, he should have been excused, whereas if the former is the case, he should have been convicted.

3. *The Volitional Test*

Whether the insanity defense should also include a volitional test is

102. See Morse, *supra* note 48, at 40-42.

103. *Id.* at 5-9.

more problematic as a matter of social policy. Should mental disorder provide the basis for a compulsion branch of the insanity defense and could such a compulsion excuse be properly adjudicated?

An insanity defense for compulsion, a so-called "volitional" test, will be possible only if mental disorder produces the hard choice. Many persons believe that disordered behavior or behavior related to it is particularly compelled and, consequently, that there is a special relationship between mental disorder and compulsion. By contrast, I believe that the relationship of mental disorder to compulsion is frustratingly vague,¹⁰⁴ and that there is no such special or necessary relationship. Examination of the Model Penal Code's (the MPC) provisions concerning these issues is instructive.¹⁰⁵ The MPC bases general prima facie liability on a voluntary act, but defines voluntariness negatively by listing a series of specific bodily movements, such as reflexes, that are not considered voluntary.¹⁰⁶ The MPC also exempts from the voluntary category a vague, general class of bodily movements that are "not a product of the effort or determination of the actor, either conscious or habitual."¹⁰⁷ Movements performed under the influence of mental disorder are not specifically listed as involuntary, and the behavior of disordered persons does not fit the vague, general exemption. Acts influenced by mental disorder are not reflexive, unconscious, or the like; crazy persons may have crazy reasons for their actions, but their acts are clearly products of conscious effort or determination. Thus, the MPC insanity test that absolves an actor who "lacks substantial capacity to conform his conduct . . . to the requirements of law"¹⁰⁸ excuses the actor for a reason other than the involuntariness of the criminal conduct.

Are disordered persons excused because their acts, although voluntary, involve hard-choice situations? Again, the answer appears negative. Crazy persons may act on the basis of hallucinations, delusions, or other misperceptions of reality, but they usually act without the pressure of a hard choice. Moreover, just because the crimes of crazy persons are *caused* does not mean that they are compelled. All actions are caused, but not all result from facing a hard choice. Much of the argument that

104. Indeed, I believe that the availability of a compulsion defense should not depend on whether the defendant suffers from a mental disorder according to current concepts of what constitutes mental disorder. See *infra* text accompanying notes 109-13, 122.

105. H. FINGARETTE & A. HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 46-47 (1979).

106. MODEL PENAL CODE §§ 2.01(1), 2.01(2)(a)-(c) (Proposed Official Draft 1962).

107. *Id.* § 2.01(2)(d).

108. *Id.* § 4.01(1).

the acts of crazy persons are compelled or involuntary is simply a form of loose talk intended to justify the conclusion that crazy persons are not responsible. Very few crazy persons face hard choices because of craziness, however, and very few are therefore compelled. In the absence of such compulsion, it is difficult to make conceptual sense of the so-called volitional prong of the tests for legal insanity.

We can understand that some test was originally needed to cope with cases of crazy persons who seemed to know right from wrong, but nevertheless acted for crazy reasons. The person who acts on the basis of a religious delusion is an example. But such a person is not compelled simply because he or she acts on the basis of a strongly held, albeit crazy, belief. Nor is the person compelled because craziness influenced the behavior. In the absence of a hard choice, action pursuant to a crazy desire is no more compelled than action based on a normal desire. The proper reason to excuse, of course, is that the person was irrational—even though narrowly aware of right and wrong—not that the person was compelled. Thus, a reasonable explanation of the current use of the volitional prong is approximately this: A person who is grossly out of touch with reality, all mixed up about the world, finds it harder to behave appropriately, including lawfully/rightly. “Harder” does not imply compelled in the volitional sense, however. It simply means that it is *more difficult* to act appropriately if crazy thoughts and feelings interfere. Again, the law should treat such cases as instances of irrationality, not compulsion.

Are there any cases of crazy persons in which a pure compulsion excuse seems proper? The only appropriate instances appear to be the so-called impulse disorders, where the actor is cognitively rational but has an inner craving to do a prohibited act, for example, the kleptomaniac’s impulse to steal, the DDP’s desire for drugs, or the pedophile’s desire for sexual contact with children. Although these people are cognitively rational,¹⁰⁹ they do suffer from a mental disorder according to the current, predominant psychiatric classification system of the American Psychiatric Association,¹¹⁰ and all of their crimes—lewd and lascivious conduct with minor, theft, drug use—would, in principle, result from impulses arising from mental disorder.¹¹¹ Are these hard-choice situations, however, and, further, are they distinguishable from other “nor-

109. See *supra* notes 19-26 and accompanying text.

110. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 164-65, 271-72, 293-94 (3d ed. 1980) [hereinafter cited as DSM-III].

111. *Id.* at 164-65 (substance abuse); *id.* at 271-72 (pedophilia); *id.* at 293-94 (kleptomania).

mal" predispositions such as "moneyphilia" (the greedy person's craving for money) that may lead to illegal behavior?

Although impossible to prove, it seems likely that inner cravings can sometimes produce hard-choice situations. If the inner craving is strong enough, produces fear of the pain caused by refusing the craving, and no reasonable alternative courses of action are available, then perhaps an excuse should obtain. But why excuse the kleptomaniac or DDP, but not the moneyphile? One could argue that the moneyphile does not suffer from a disease whereas the kleptomaniac or DDP does, but this would allow the tail to wag the dog. Medical categories should not dictate legal excuses. If a particular moneyphile meets the hard-choice moral/legal criteria for excuse, why should it matter whether the condition is a recognized mental disorder? Both normal and abnormal cravers will sometimes face true pain caused by factors for which they are not responsible. Although people who suffer from abnormal cravings may have fewer alternatives than people who suffer from normal cravings, it is surely true that some normal cravers are sometimes in situations where there are no reasonable alternatives. The upshot of this analysis is that there may be cases of mental disorder that necessitate an independent compulsion branch of the insanity defense. In the absence of a general compulsion excuse, however, the conceptual problem is limiting the defense to abnormal cravings. I see no rational way to do this, although intuitively the criteria may be more likely satisfied by abnormal cravers.

Perhaps the dilemma created by the fuzzy distinction between normal and abnormal cravings can be resolved in the following definitional manner: We might wish to redefine as abnormal any craving that *compels* illegal behavior because the law cannot expect unusually difficult self-restraint. Thus, such strong inner cravings must be abnormal by definition. It is of course possible to classify these extreme conditions as mental disorders,¹¹² but such redefinition simply begs the hard conceptual questions of what behavior should be considered mental disorder and whether mental disorder should be a necessary criterion for a compulsion excuse. As a practical matter, few persons might try to raise such a defense for fear of facing life-long restraint, even if they are not responsible for their inner cravings.

The consideration of the distinction between normal and abnormal cravings also helps clarify the law's treatment of various strong desires to offend. For example, in a recent case a court rejected a defendant's claim

112. Such conditions would fit the generic definition of mental disorder provided by the American Psychiatric Association. DSM-III, *supra* note 110, at 6.

that "pathological gambling" should support an insanity defense, in part on the ground that a very strong desire does not amount to a compulsion.¹¹³ But was the court's analysis correct? Any strong desire to offend will certainly cause pain if the person foregoes offending, and one can argue that the desire must have been very strong indeed if fear of the law was not strong enough to inhibit the offense. Thus, a defendant could claim that foregoing gambling, raping, burning, or whatever would have produced substantially more pain than offending, and that fear of the former motivated the offense.

The problem with such claims is that they simply are not credible, except perhaps in extreme cases. We do not believe that it is fear of the pain of not raping, burning, or gambling that drives the actor. Instead, we are quite sure in most cases that it is the pleasure offending will produce—a personal gain—that drives the person. In a given case, however, the defendant may be able to convince us that the desire or craving was so intense that fear of the pain of not satisfying it was the true motive for offending. Indeed, the actor might claim that he or she hated the impulse and loathed himself or herself for having it. Perhaps these situations are what is meant by "pathological" impulses of any type, and an excuse should obtain in such extreme cases. Note, however, that compulsion causes us to classify the impulse as "pathological"; the label "pathological" does not cause us to classify the case as one of compulsion.

Finally, one might argue that there is no volitional problem at all in cases of inner cravings. Herbert Fingarette and Anne Hasse, for example, have argued that the person who acts "compulsively" or under the influence of some irresistible impulse, mood, or passion is absolutely intent on acting.¹¹⁴ By what independent criteria, they ask, could one classify such conduct as involuntary: "On the face of it, one would see 'compulsive' conduct as an expression of (stubborn) 'will' *par excellence*."¹¹⁵ They conclude that something ought to excuse defendants in cases of such extraordinary "persistence," but the ground for the excuse is that the person's behavior was irrational rather than involuntary.¹¹⁶

Fingarette and Hasse are surely correct in stating that compelled behavior is intentional and that notions of the will being overwhelmed are metaphysical.¹¹⁷ The hard-choice criteria are hardly metaphysical,

113. *United States v. Lyons*, 731 F.2d 243, 245 (5th Cir. 1984).

114. H. FINGARETTE & A. HASSE, *supra* note 105, at 61.

115. *Id.* (emphasis in original).

116. *Id.*

117. *Id.*

however, and the difficulty of assessing them in cases of inner cravings is primarily a practical ground for distinguishing cases of external compulsion such as duress. If obstinate single-mindedness were a criterion for irrationality, would not all single-minded persons, such as Martin Luther, be considered irrational? One could distinguish the cases of inner cravings based on the rationality of the goal obstinately pursued, but it is extraordinarily difficult to assess the rationality of goals.¹¹⁸ For instance, one could rationally classify the goal of the kleptomaniac as the relief of psychic tension produced by the desire to steal. If the goal is "stealing without reason" the goal appears irrational, but on what ground, independent of the result we wish to achieve, should we prefer that characterization of the goal? In the case of the DDP or the pedophile, the irrationality analysis is even more problematic. Sexual pleasure or enjoyable drug-induced feelings are quite rational goals, and the means chosen to achieve them, albeit illegal, are rationally adapted to succeed. Note, too, that the means Luther chose to reform the Church were also considered illegitimate, albeit rationally adapted to his goal.

A final argument for treating some cases of inner cravings as rationality problems would be this: Suppose the actor does not accept such impulses; they do not feel like part of the actor, who is ashamed of them, hates them, disowns them, or whatever. The actor may be able to choose means rationally suited to achieve the ends dictated by the disowned and unaccepted cravings, but one might argue that such a person, whose desires are in such conflict, is not rational. Intense and uncomfortable ambivalence or conflict about one's desires would then become a touchstone of irrationality. In these cases the criteria for irrationality collapse into those of hard choice (or vice versa) because the person suffering from intense conflict arguably faces a hard choice. Does rationality require that persons be the (comfortable) masters of their own houses, however? These persons' goals are intelligible and nothing is amiss with their practical reasoning. There is no cognitive misfiring if such persons feel intensely competing desires, even ones that may be deemed unacceptable. Although considering ambivalent persons irrational may be an appealing practical solution to the problem of defining hard choices in some cases of inner cravings, doing so appears to be a conclusory use of an unusual definition. I believe our ordinary intuition in such cases is that the problem is hard choice and not irrationality. Ambivalence is not a criterion for irrationality. Finally, not all persons are ambivalent about

118. See *supra* text accompanying note 14.

their impulses, and some of these persons may nonetheless face hard choices.

There appears to be a *prima facie* case for a compulsion branch of the insanity defense, but is it persuasive and would the test be workable? If or to what degree a person's desire or impulse to act was controllable is not determinable: there is no scientific test to judge whether an impulse was irresistible or simply not resisted. At best, we may develop a phenomenological account of the defendant's subjective state of mind that will permit a common sense assessment of how much compulsion existed. Mental health experts would still be unable to determine scientifically if a defendant was sufficiently compelled to be *legally* insane. Legal insanity is not a scientific or purely empirical issue; experts can, at most, provide richly detailed information about the defendant's mental state at the time of the crime and under similar circumstances in the past.

Assuming that assessment of compulsion problems is possible, should such problems negate responsibility if the defendant otherwise seems fundamentally cognitively rational? The criminal law already allows excuses or mitigation for control problems—for example, duress and the provocation/passion formula to reduce murder to manslaughter—so an excuse for such problems has ample precedent.¹¹⁹ In fact, however, as we have seen, a strong impulse to offend almost always results from some species of cognitive irrationality, and a primary difficulty with excusing allegedly compelled but rational persons on the ground of insanity is that they do not seem substantially crazy. Their urges may be inexplicable to most people, but overall these persons appear fundamentally rational. Most people continue to believe that if an actor was reasonably rational, then the behavior could have been controlled.¹²⁰ Laypersons are more likely to consider these urges bad rather than mad, and to blame the impulse-driven person for having or giving in to them. As a result, laypersons are far less willing to accept the conclusion that these people are mentally disordered. Indeed, whether these sorts of conditions are appropriately characterized as disorders is a matter of some dispute even within the mental health professions.¹²¹ By contrast, it is generally conceded that persons who are fundamentally irrational are

119. A defendant acting in the heat of passion can also be seen as suffering from rationality problems rather than self-control problems. Although this might be the more accurate view, self-control problems are a traditional justification for heat of passion mitigation.

120. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 176 (1968).

121. Eysenck, Wakefield, Jr. & Friedman, *Diagnoses and Clinical Assessment: The DSM-III*, 34 ANN. REV. PSYCHOLOGY 167, 189 (1983).

"sick," and they are therefore rarely blamed for their irrationality. Thus, an insanity defense for pure impulse problems threatens to undermine the moral support for the defense.

More importantly, a legal excuse for "impulse" problems in the absence of cognitive irrationality raises perhaps intractable line-drawing problems. How should society respond to an otherwise rational person who describes an "overwhelming" urge to offend based on a hard choice for whatever cause? Consider an otherwise normal but highly dependent person who offends in response to strong peer pressure to take part in a criminal scheme. What reason is there to believe that this person is less compelled than a mentally disordered person?¹²² Moreover, what is to prevent mental health professionals from defining as disordered anyone who gives in to such an urge to offend? One need only consult the criteria for the American Psychiatric Association's diagnostic category, "Antisocial Personality Disorder,"¹²³ to determine that, in some measure, such a definition of disorder has already been adopted. Medical doctrines may thus swallow up those of the law. There are mentally disordered persons who feel terribly strong urges that most people would consider abnormal, and on occasion these persons yield to such urges and offend the law. But providing an insanity defense in these cases is practically difficult and morally questionable.

Finally, volitional tests provide mental health experts with the chance to present the court with the shakiest scientific and clinical data and conclusions. In my experience, few mental health professionals understand the relationship between determinism and legal responsibility, apparently due to a belief that determinism and responsibility are necessarily incompatible.¹²⁴ They commonly confuse causation with excuse.¹²⁵ For instance, they may believe that a defendant who acted on the basis of a delusion must have been unable to test reality against the delusion or to resist acting on the delusion. Sometimes the belief is even more simplistic: if the defendant's criminal behavior was influenced by mental disorder, the defendant must not have been responsible. There are no scientific tests for whether defendants could have controlled themselves,

122. J. FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 282 (1970); see *supra* text accompanying notes 109-13.

123. See DSM-III, *supra* note 110, at 317-21.

124. See *State v. Sikora*, 44 N.J. 453, 461, 210 A.2d 193, 197 (1965) (testimony assuming that all persons are determined and not responsible). For a discussion of the position that determinism and responsibility are compatible, see L. DAVIS, *supra* note 33, *passim*; A. KENNY, *FREE WILL AND RESPONSIBILITY* 22-45 (1978); Moore, *supra* note 33, *passim*.

125. See, e.g., *supra* text accompanying notes 40-51.

however, and the presence of mental disorder at the time of a crime does not inexorably lead to the conclusion that a defendant is not responsible. Nevertheless, mental health experts repeatedly offer such conclusions, wrapping nonscientific and often confused moral assessments in the esteemed and protective mantles of science and medicine.¹²⁶ These difficulties may be ameliorated to some extent by restricting expert testimony, as I argue later,¹²⁷ but testimony on the volitional issue will inevitably be less rigorous than on the cognitive issue.

I confess to considerable ambivalence about volitional tests for legal insanity. On the one hand, as noted, the law already allows other volitional excuses such as duress. In principle, why should the law distinguish between the compulsion produced by a gun at one's head and the compulsion produced by psychological or biological variables? Few people would deny that in some cases internal pressures can be strong.¹²⁸ Nevertheless, I believe that retaining a volitional branch would be a mistake: distinguishing between resistible and irresistible internal states is simply too difficult.

Many persons have a strong intuition that compulsion (or hard choice) not tied to irrationality should be an independent basis of excuse, but it is difficult to provide adequate criteria for compulsion that morally justify excusing. I have tried to do so, but many persons sympathetic to the compulsion ground for excuse will find those criteria unsatisfactory. On the other hand, I have been unable to devise better criteria for inner compulsion. This does not mean, of course, that such criteria do not exist. If theoretically satisfactory criteria for inner compulsions based on mental disorder cannot be provided, however, it is conceivable that inner compulsion independent of irrationality should not provide a moral ground for excuse. Moreover, adjudicating volitional tests is fraught with the dangers of using unscientific and misleading expert testimony. In contrast, it is far easier to determine what a person of reasonable firmness would do when confronted with an external threat, the nature and

126. This is much less of a problem for a cognitive test. What a defendant believed is hard to determine, but, unlike whether a defendant was compelled, it is nonetheless a more determinate question. Such differences have led many recent commentators to suggest abolishing the volitional branch. STATEMENT ON THE INSANITY DEFENSE, *supra* note 97, at 11. The AMA also subscribes to this view. AMA REPORT, *supra* note 40, at 2971.

127. See *infra* text accompanying notes 131-35.

128. An interesting issue is whether we should expect persons to resist such feelings by exerting greater self-control as the severity of the "compelled" harm increases. The Model Penal Code already does this in the case of duress by inquiring whether a person of reasonable firmness would yield. MODEL PENAL CODE § 2.09(1) (Proposed Official Draft 1962). A person of reasonable firmness would presumably yield less readily to the command to commit a more heinous crime.

strength of which can be more objectively determined. Finally, I fear for the public perception of the morality and wisdom of the insanity defense if we allow an excuse for persons not generally viewed as sick.

If our intuition about internal compulsions as an independent basis of excuse is strong enough to overcome the difficulties with determining what those compulsions are, then the law must retain a volitional branch of the insanity defense test. But, it should then excuse only those defendants whose nonculpable impulse¹²⁹ was the overwhelmingly predominant reason they offended. The compulsion criteria must be met. Impulse problems range along a continuum of hard choices, of course, but the law should require the greatest possible degree of self-control from all persons, and should excuse only those whose compulsions drove them beyond any reasonable margin of self-discipline. Although some persons with great compulsion problems may still be convicted under such a stringent formula, those convicted would be only those whose hard choices were not overwhelming. The law should require such persons to restrain themselves, even if it is hard for them to do so.

4. *The Crazyness Test*

Although a workable, restricted test similar to present tests can be constructed, I would like to suggest a new alternative:

A defendant is not guilty by reason of insanity if, at the time of the offense, the defendant was so extremely crazy and the crazyness so substantially affected the criminal behavior that the defendant does not deserve to be punished.

From past experience, I know that this test produces reactions ranging from utter disbelief to profound shock. Immediate critical responses include the following: It is too vague; it gives juries unbridled discretion and no guidance; it fails to mention mental disorder; it will allow too many acquittals. My responses to such criticisms are that this test tracks the moral issues with greater honesty and precision, is more workable, and will not lead to more acquittals or "wrong" acquittals more often than do present tests or reformed versions of present tests.

Legal insanity is a social, moral, and legal issue, not a medical or psychiatric issue. The question in insanity defense cases is *not* whether the defendant suffered from a mental disorder; the real issue that juries decide—no matter what test they use—is whether the defendant's behavior related to the offense was *so* crazy, *so* irrational, that the defendant

129. See *supra* text accompanying notes 17-23.

should be excused.¹³⁰ The virtue of the proposed test is that it asks this basic question directly and without pseudomedicalization. The relationship of craziness to responsibility can be unpacked into cognitive and volitional considerations, but doing so in an insanity defense test provides only an aura of false precision and guidance. Indeed, the proposed test is no more vague than are present tests. Present criterial formulations—for example, knowing right from wrong or lacking substantial capacity to appreciate the criminality or wrongfulness of one's actions—are hardly bright line tests that give juries clear guidance. Moreover, formulations involving cognitive or volitional disabilities often confuse juries, whereas a craziness standard is more within the domain of common sense. Adding language about “extremeness” makes it even clearer to the jury that the test is meant to be restricted to very few defendants. If one objects that the word “extreme” is vague, let me suggest that it is likely to be clearer to a lay juror than the phrase “lack of substantial capacity.” Jurors instructed to use the craziness test are no more or less likely to acquit than they are with any other test, because the question is always the same despite differences in wording. Finally, this test would have an enormously salutary role in helping define the proper role of experts in insanity defense trials.

B. LIMITING THE ROLE OF MENTAL HEALTH EXPERTS

The proper role of experts is a major source of criticism of the insanity defense's administration. An appalling “circus atmosphere” results when mental health experts give opposing psychiatric and legal conclusions or weave fanciful theories about the defendant's behavior. The battle of the experts is especially dismaying when it occurs in highly publicized or politically or socially important cases such as the prosecution of Sirhan Sirhan, Patty Hearst, or John Hinckley, Jr.¹³¹ In all fairness, the problem is not the experts' fault. The legal system has created this predicament by asking the wrong questions. The answer is not to abandon the defense, however, but to reform the role of the experts by recognizing and asking the proper questions.

The basic issue in insanity defense cases—whether the defendant's craziness so influenced the criminal behavior that it would be unjust to

130. This claim, which is impossible either to prove or disprove, is supported to some degree by common sense and by the research cited in Pasewark, *supra* note 59, at 385-90 (demonstrating that the test used probably does not substantially affect jury outcomes).

131. The “circus atmosphere” objection may be overstated because in cases of clear insanity there is seldom a trial. MYTHS AND REALITIES, *supra* note 54, at 23-24. Nonetheless, it is a substantial problem in some cases, especially those that are highly publicized.

convict and punish the defendant—is, as noted, a social, moral, and legal issue and not a medical question. Diagnoses and unvalidated speculations are simply irrelevant to this question.¹³² Diagnoses and causal speculations may be helpful in the clinic, consulting room, and research laboratory, but knowing whether and allegedly why the defendant suffers from a particular mental disorder according to current diagnostic nomenclature or etiological theories is not useful in a courtroom in deciding whether the defendant was legally sane. The issue is not whether or why the defendant suffers from any particular mental disorder, but whether the insanity defense test is met. This can be demonstrated far more convincingly by factual descriptions of behavior than by the ascription of labels or the postulation of theories.¹³³ What factfinders need are full, textured descriptions of the defendant's behavior, not diagnoses or speculations about the causes of the defendant's behavior. Learning that a defendant killed because he believed he was the victim of a plot is relevant to determining if he knew the moral nature of his acts; learning that the defendant was suffering from paranoid schizophrenia does not aid that determination. A scientifically unvalidated speculation about why this defendant believed he was the victim of a plot is likewise irrelevant to a cognitive, volitional, or craziness test, and, worse, it is confusing. Moreover, knowing the alleged cause of behavior does not tell us whether the defendant was compelled. All behavior is caused, but causation is not the equivalent of compulsion. Jurors' frequent complaints that they cannot be expected to resolve insanity defense cases when even the experts disagree about the diagnoses or why defendants behaved as they did demonstrate that the jurors have seriously misunderstood the insanity defense.

Finally, mental health experts have no expertise whatsoever about the ultimate issue of legal insanity precisely because it is a nonexpert, legal issue. Whether and to what degree a defendant was sufficiently crazy, knew the morally relevant facts, or was compelled are common-sense judgments that must be made on the basis of knowledge of the defendant's thoughts, feelings, and actions. There is no scientific test that enables us to draw these inferences; it is a matter of common sense and lay assessment based on common life experience. Again, whether the irrationality or compulsion was sufficient for legal excuse is a moral and legal determination, not a purely factual matter. It may be difficult to

132. See Morse, *supra* note 3, at 604-19; Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 1044-52, 1059-82 (1982); Morse, *supra* note 48, at 51-55.

133. See *infra* note 134 and accompanying text.

agree on a verdict in close insanity defense cases, but this is not because the ultimate issue is a scientific matter beyond the ken of laypersons. These are just hard cases. When experts offer opinions on the ultimate legal issue, they function not as scientific experts but as thirteenth jurors in a system that has decided twelve persons good and true are sufficient.

To remedy the "circus atmosphere" of insanity trials, experts should be prohibited from offering diagnoses, unvalidated explanations, and ultimate legal conclusions.¹³⁴ Most of the conflicting expert testimony in insanity defense cases concerns mental health conclusions, such as diagnoses or speculative explanations, and legal conclusions. Experts are far less likely to disagree about behavioral descriptions than about diagnoses irrelevant to the *legal* determination that must be made. It is the descriptions that jurors or judges need. Even if the behavioral descriptions still provide an opportunity for experts to affect verdicts, it will probably be harder to bias observations than conclusions, and jurors are more likely to evaluate such bias adequately. When unnecessary and speculative explanations are admitted into evidence, they too will be a source of disagreement: one does not expect agreement on matters that lack a firm scientific foundation. Finally, expert disagreement about legal issues is totally predictable because there is no reason why mental health experts should agree on an issue that is not a matter of mental health expertise.

Experts should be limited to offering both full, rich, clinical descriptions of thoughts, feelings, and actions and relevant data based on sound scientific studies. They will then perform a useful function and, in most cases, the battle of the experts will be reduced to minor skirmishes. There will be less expert disagreement and consequently less jury confusion. The factfinder will be better able to resolve the remaining conflicts because these will largely involve data about behavior that jurors can assess themselves. In sum, experts should be limited to offering only the data that are truly relevant and within their area of expertise. This will reduce the confusion between psychiatric and legal issues experienced by jurors and society at large, better enable juries to understand individual cases, and preserve greater respect for the trial process.¹³⁵

134. This final suggestion about legal conclusions has been adopted by many commentators and by the new federal legislation. See STATEMENT ON THE INSANITY DEFENSE, *supra* note 97, at 14; AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-3.9(a) (1984).

135. Note that the craziness test for legal insanity would decrease the likelihood that experts would offer and courts would accept the irrelevant or actually nonexpert testimony that represents the bulk of expert evidence today. Deleting mention of mental disorder in the test removes a major source of confusion of scientific and legal issues. Diagnoses and causal speculations are irrelevant and the ultimate determination is legal, not scientific. The common sense and ordinary language of

C. ALLOCATING THE BURDEN OF PERSUASION

Allocating the burden of persuasion on insanity is a particularly thorny issue. Because insanity is an affirmative defense that does not negate the elements of the *prima facie* case, the federal Constitution permits the burden of persuasion to remain on the defendant.¹³⁶ Nevertheless, once the defendant has produced sufficient evidence to raise the issue, many jurisdictions shift the burden of persuasion to the prosecution to prove sanity beyond a reasonable doubt. Because a defendant's mental disorder may fundamentally affect culpability, the argument that the state should assume the risk of error by bearing the burden of persuasion is reasonable.¹³⁷ This argument is premised on the social belief that it is better for ten truly sane people to be acquitted than for one truly insane person to be convicted; our society prefers a wrongful acquittal to a wrongful conviction.¹³⁸

I believe, however, that the law should place the burden of persuasion on the defendant by a preponderance of the evidence. All factors bearing on guilt, including universally accepted defenses such as self-defense, need not be proven by the prosecution. By so placing the burden, society would minimize the risk of success of insanity defenses in questionable cases, and at the same time would permit the defense to succeed in the few cases in which it is morally proper. The defendant is making a claim that is rarely justified and personally possesses particularly privileged access to the information necessary to support the plea. Although the prosecution may have its own expert examine the defendant, the defendant nevertheless retains a major advantage on the issue because the defendant is best able to provide testimony about past mental state. In insanity cases, where motives are often in issue, the usual inferences about mental states that are drawn from observing behavior cannot be made with the same degree of certainty as in cases involving technical *mens rea* elements because the defendant's mental state is allegedly both unusual and abnormal. Requiring the prosecution to prove sanity once

the test would increase juror confidence by showing them that the determination to be made is well within their competence. The experts' ability to overwhelm or plainly bamboozle jurors would be reduced.

136. See *Rivera v. State*, 351 A.2d 561, 562-63 (Del.), *appeal denied*, 429 U.S. 877 (1976).

137. *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975); see also *Patterson v. New York*, 432 U.S. 197, 226-27 (1977) (Powell, J., dissenting) (state should assume burden "only if the factor at issue makes a substantial difference between guilt and innocence").

138. This is a paraphrase, of course, of the chestnut that it is better to free ten guilty persons than to convict one innocent person. The Supreme Court has rejected this analogy in the civil commitment context. *Addington v. Texas*, 441 U.S. 418, 428 (1979) (refusing to apply the reasonable doubt standard).

the slight production burden is met is simply too difficult; it will allow the defense to be raised in an unjustifiably high number of cases. No substantial injustice to the defendant will result from placing the persuasion burden on the defendant because, when legal insanity is truly present under a narrow test for insanity, most cases will be quite clear. Finally, if the insanity defense is not constitutionally required,¹³⁹ providing it is solely a voluntary act of compassion by the state. Because the state is not required to prove every factor bearing on culpability, placing the insanity burden on the defendant is no more unfair than similar placement of any other affirmative defense such as duress.

An alternative is to allocate the burden of persuasion to the prosecution, but to lower the standard from "beyond a reasonable doubt" to "a preponderance of the evidence" or "clear and convincing evidence." This would decrease the risk of error to the defendant somewhat, while still allowing society to decrease its risk somewhat of unwarranted but successful insanity pleas. I do not favor this compromise because it increases the risk of questionable verdicts and creates too much evidentiary difficulty for the prosecution, but it would be a better solution than forcing the prosecution to prove sanity beyond a reasonable doubt.

D. POSTACQUITTAL STANDARDS AND PROCEDURES: COMMITMENT AND RELEASE

The crucial and most unsettling issue for most persons is deciding what should be done with those who are acquitted by reason of insanity. In the past, acquitted defendants were automatically committed to state hospitals for the criminally insane—institutions normally just as punitive as prisons—and they typically remained there for lengthy periods, often for the rest of their lives. Thus, society was able, in effect, to punish these persons despite their lack of legal responsibility. Society's fear of insanity acquittals was vitiated because acquittees were committed with little if any hope of early release.

More recently, the law affecting insanity acquittees has changed in response to both concern for their constitutional rights and a better understanding of the purposes of their commitments.¹⁴⁰ Defendants acquit-

139. See *supra* text accompanying note 83.

140. German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011, 1056-74 (1976); Morris, *Dealing Responsibly with the Criminally Irresponsible*, 1982 ARIZ. ST. L.J. 855, 870-83; Note, *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U. L. REV. 281, 288-90 (1982).

A standard claim over the years has been that the insanity defense is a sham because acquitted

ted because of insanity are now entitled to hearings within a reasonable period after acquittal to determine if they are still mentally disordered and dangerous.¹⁴¹ An acquittal by reason of insanity is based on the defendant's *past* mental state at the time of the offense, whereas the acquittal typically occurs months or even years later, by which time the defendant's condition may have changed considerably. Commitment is not justified unless the insanity acquittee is currently dangerous because of continued disorder.¹⁴² Moreover, it is reasonably clear that committed insanity acquittees are entitled to reasonable, periodic review of their continuing need for confinement¹⁴³ and to adequate treatment.¹⁴⁴ In-

defendants are in fact punished as harshly as they would have been if they were convicted. See, e.g., L. COLEMAN, *THE REIGN OF ERROR: PSYCHIATRY, AUTHORITY AND LAW* 32, 52-54, 61 (1984). It might be argued, consequently, that legal changes meant to protect the right of acquittees are hypocritical and should not be pursued. I do not deny the ambivalence with which society treats insanity acquittees, but this ambivalence is not a justification for abolishing the defense or abandoning attempts to make the commitment process and the conditions of commitment as fair, humane, and nonpunitive as possible. Indeed, recognition of this ambivalence and of past hypocrisy should spur reform efforts.

141. See, e.g., CAL. PENAL CODE § 1026 (West 1982 & Supp. 1985).

142. Note that commitment should follow only if the acquittee is dangerous *because* disordered. If the person is disordered and dangerous but the two conditions are not related, commitment is improper because neither mental disorder nor dangerousness alone justifies commitment. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."). This point is discussed in detail *infra* notes 147-51 and accompanying text.

143. The Supreme Court has never directly ruled on this point, but a number of cases are analogous. In *Addington v. Texas*, 441 U.S. 418, 428-29 (1979), the Court strongly implied that periodic reexamination of the basis for commitment was constitutionally required. Although it is arguable that different standards and procedures for releasing committees and acquittees might be constitutionally permissible, it is difficult to justify failing to provide acquittees with some formal, periodic opportunity to demonstrate that the purposes of commitment are no longer met. See also *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975) (involuntary civil commitment must end if the commitment criteria are no longer satisfied).

144. In *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982), the state conceded and the Supreme Court appeared to assume that an institutionalized inmate of a hospital for the retarded was entitled to medical care, and in *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1977), the Court held that the failure of prison officials or personnel to attend to the serious medical needs of an inmate constituted a violation of the eighth amendment.

I believe that *Youngberg* and *Gamble* together stand for the proposition that any involuntary inmate of a state institution has a right to minimally adequate medical care. See Note, *The Constitutional Right to Treatment in Light of Youngberg v. Romeo*, 72 GEO. L.J. 1785, 1794 n.46 (1984). Because mental disorder must be considered a medical problem if the commitment process is to retain its medical justification, and because acquittees suffer from serious disorders by definition, the acquittees are entitled to minimally reasonable treatment for mental as well as physical disorders. I am not suggesting that there is an extensive constitutional right to treatment for involuntary psychiatric patients, although I believe there should be. I am suggesting, however, that if mental disorder is just like any other disorder, involuntary patients who suffer from it are constitutionally entitled to minimally reasonable care for it. It seems clear, for instance, that a prison failing to provide any treatment to a convict who became wildly psychotic while serving a prison term would violate the eighth amendment rights prescribed in *Gamble*. Similarly, acquittees must be provided reasonable

sanity acquittees committed to an institution are disordered, nonresponsible, and incarcerated with no opportunity to seek treatment on their own, and *treatment is one of the purposes of commitment to a hospital*. Given the advances in psychiatric and psychological treatment, many acquittees can now be restored to a symptomless condition in relatively short periods of time, and a good number are released quickly.

The early release of insanity acquittees is the major concern of insanity defense critics. They point to the few cases in which those released have committed heinous crimes even though mental health professionals deemed them well and no longer dangerous. Those who fear for societal safety doubt the ability of mental health professionals either to determine reliably which insanity acquittees are substantially cured or to predict accurately who will no longer be a threat. These criticisms and concerns have considerable merit, so it is important to analyze carefully the morality and practicality of postinsanity acquittal procedures.

We should be clear that it is unjust to *punish* someone who is not responsible. The argument that insanity acquittees who are released early do not receive their just deserts is simply illogical and improper because nonresponsible persons do not deserve to be punished. A fixed hospital term, tied to the length of the prison sentence allowed for the crime charged, is also improper for the same reason: hospital commitment should be related to continuing disorder, not to irrelevant punishment concerns.¹⁴⁵ In large measure the terms of sentences are defined by the punishment the offender deserves. To the extent that incapacitation is a factor in determining the length of prison sentences, first, the general term is still limited by desert, and, second, the length of the particular term is calculated on the basis of a rational actor, whereas the criminal deed and dangerousness of the insanity acquittee is by definition the result of fundamental irrationality. The morally and socially appropriate response to a person who is acquitted on the ground of insanity but who is still dangerously disordered is nonpenal detention and reasonable treatment. The basic dilemma remains, however: by what criteria and procedures should an acquittee be committed and released?

medical care, which includes psychiatric treatment, for their serious mental disorders. In sum, I think that, as a logical matter, *Youngberg* and *Gamble* have committed the Supreme Court to at least a minimal, constitutionally based right to psychiatric treatment for involuntary inmates of any institution who suffer from serious mental disorders.

145. See *Jones v. United States*, 103 S. Ct. 3043, 3052 (1983).

1. *Commitment and Release Standards*

Confinement of an acquittee in a hospital makes no sense and is probably unconstitutional when the committee reaches one of three distinct states: (1) dangerous but noncrazy; (2) nondangerous but crazy; or (3) crazy and dangerous but not dangerous as a result of craziness. Let us consider these possibilities in order.

First, an acquittee who is no longer disordered should be released; there is no mental health reason to continue incarceration and punishment has been ruled out by the verdict of acquittal. Even though the noncrazy person remains dangerous, the danger no longer stems from mental disorder, and preventive detention for mere dangerousness in the mental health law system is almost certainly unconstitutional.¹⁴⁶ Many professionals believe, however, that severely disordered persons are incurable and can only be temporarily relieved of symptoms, especially by medication. Thus, there is no guarantee that such persons will not become crazy again, especially if they fail, as many crazy persons do, to take their medication regularly after release. Critics also claim that it is easy to feign sanity, and that, even in the absence of any chicanery, mental health professionals cannot reliably determine if a person is cured. On the other hand, many mental health professionals believe that most acquittees' mental disorders can at least be controlled with reasonable success, given proper treatment. There can be no certainty about cure, but reasonable estimates are possible.

Second, if the person remains disordered but is no longer dangerous, confinement is likewise unwarranted if the person can live safely in the community, either alone or with the help of willing others such as family or friends.¹⁴⁷ In such cases, of course, society must directly confront how much weight should be given to mental health predictions of dangerousness. Critics point out that mental health professionals are poor clinical predictors of long-term violence, a fact explicitly recognized by the American Psychiatric Association.¹⁴⁸ Consequently, we may have to use common sense to predict dangerousness, but we can be reasonably comforted by the knowledge that few released insanity acquittees commit heinous deeds.¹⁴⁹ If predictions of dangerousness can be used to support

146. See Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1238 (1974) (deprivation of due process imposed by involuntary commitment).

147. *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

148. See *Barefoot v. Estelle*, 103 S. Ct. 3383, 3397 (1983) (citing amicus brief of the American Psychiatric Association).

149. The recidivism rate of released acquittees is apparently no greater than the recidivism rate

the death penalty,¹⁵⁰ where an error means certain death, then society should certainly be willing to assume the risk of possibly wrong predictions of *nondangerousness*, which have far fewer certain harmful consequences;¹⁵¹ where liberty is at stake society should take risks.

Third, in some instances the committed acquittee may still be crazy and dangerous, but, although the crime committed by the acquittee was related to the craziness, the present dangerousness is not.¹⁵² In such cases, the acquittee should also be released because the purpose of a post-insanity acquittal commitment is no longer served: the person is not dangerous because of mental disorder, and future detention based on dangerousness alone is unacceptable. Such a person is similar to a convicted person who is crazy and unrelatedly dangerous, and who must be released at the end of the prison term imposed. We will be tempted always to assume that the craziness does produce the dangerousness when considering insanity acquittees, but this will not always be so. The determination of whether the craziness and dangerousness are related will often be difficult, but it must be made if continuing commitment is to be justified.

There are risks involved in releasing those acquitted by reason of insanity. Some acquittees will go crazy again, and some of those who do so will commit awful crimes. Nevertheless, the essence of a free society is taking some risks in the name of liberty and justice. Undeniably dangerous convicts are released when they complete their prison terms because we believe that they have paid the price for their crimes and that it is unfair to continue to hold them for merely preventive detention. Similarly, if in the best judgments of mental health professionals and lay

of matched, convicted felons. MYTHS AND REALITIES, *supra* note 54, at 25-26; Pasewark, *supra* note 59, at 380-84. The recidivism rate for released acquittees is high, to be sure, but it is less worrisome than it first appears. There is evidence that the subsequent crimes of acquittees are less violent than the act that led to the insanity acquittal. MYTHS AND REALITIES, *supra* note 54, at 25-26. Moreover, subsequent criminality appears not to be a product of mental disorder, but is instead a function of prior criminality. Pasewark, Bieber, Bosten, Kiser & Steadman, *Criminal Recidivism Among Insanity Acquittes*, 5 INT'L J. L. & PSYCHIATRY 365, 373 (1982). Finally, the number of crimes committed by acquittees is small because there are so few acquittees.

150. See *Barefoot v. Estelle*, 103 S. Ct. 3383, 3389-90 (1983).

151. Predictions of *nondangerousness* are far more likely to be right than predictions of dangerousness. Indeed, total errors would be reduced if everyone were predicted to be *nondangerous*. Steadman & Morrissey, *The Statistical Prediction of Violent Behavior: Measuring the Costs of a Public Protectionist Versus a Civil Libertarian Model*, 5 LAW & HUM. BEHAV. 263, 271 Table 2 (1981).

152. Such a case can occur if the defendant was crazy and dangerous in ways both related and unrelated to the offense.

factfinders a person acquitted by reason of insanity meets one of the three conditions just discussed, the acquittee should be released.

2. *Commitment and Release Procedures*

If society accepts, as I believe it must, the moral argument for taking risks by releasing insanity acquittees and the logical criteria delineated earlier,¹⁵³ what remains to be resolved is identification of those procedures which should be used in the commitment and release of insanity acquittees. Indeed, most of the postinsanity acquittal litigation has addressed this issue, usually focusing on whether insanity acquittees as a class can be constitutionally distinguished from civil committees.¹⁵⁴ The Supreme Court and other courts that have considered this issue have generally upheld such a distinction and, consequently, have also upheld both easier commitment procedures and more stringent release procedures for insanity acquittees.¹⁵⁵ By contrast, I argue that differences between these classes of committees are minimal and should support only the barest procedural differences, if any.

Because dangerousness produced by craziness is the touchstone of postinsanity commitment, what can be said about the mental condition and dangerousness of insanity acquittees at the time of acquittal? An insanity acquittal decides the following about the defendant's conduct *at the time of the crime*: (1) it satisfied the prima facie elements of the crime beyond a reasonable doubt,¹⁵⁶ and (2)(a) when the prosecution bears the burden of persuasion on the insanity issue, there is reasonable doubt whether the defendant was free of substantial mental disorder and was responsible for the conduct, or, (2)(b) when the defendant bears the burden of persuasion on the insanity issue (usually by a preponderance of the evidence), more likely than not the defendant was severely crazy at the time of the offense and as a result was not legally responsible for the act.

153. See *supra* text accompanying notes 146-52.

154. Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 607-12 (1981).

155. *Jones v. United States*, 103 S. Ct. 3043, 3051 (1983) (upholding the distinction in cases where the burden of persuasion on insanity was placed on the defendant by a preponderance of the evidence); e.g., *United States v. Ecker*, 543 F.2d 178, 195-99 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); *In re Franklin*, 7 Cal. 3d 126, 141-44, 496 P.2d 465, 474-75, 101 Cal. Rptr. 553, 562-63 (1972); *accord*, Note, *supra* note 140, at 294-303 (limiting the distinction to cases of violent offenders). *Contra*, e.g., *State v. Clemons*, 110 Ariz. 79, 84, 515 P.2d 324, 329 (1973).

156. Where the issues of insanity and prima facie guilt are tried together, an insanity acquittal might not truly represent a finding of prima facie guilt. The insanity acquittal should be such a finding, however, because if prima facie guilt is not proven, the defendant should simply be acquitted. In bifurcated trial jurisdictions, the prima facie elements are satisfied.

The presumption of continuing mental disorder based on an insanity acquittal, especially if the prosecution bore the burden of persuasion, is too weak to support more stringent commitment procedures for acquittees than for civil committees. Note again that any conclusions or presumptions arising from the acquittal apply to the acquittee's condition *at the time of the criminal act*, whereas the commitment decision is based on a mental state that exists many months or years after the trial. To what extent is it reasonable to presume that the mental disorder and consequent dangerousness continue at the later date? Defendants acquitted by insanity were normally quite crazy, that is, substantially out of touch with reality, at the time of the criminal act. Substantial lack of contact with reality—the touchstone of serious mental disorder—is also the primary cause of a defendant's incompetence to stand trial. We can therefore be relatively certain that an insanity acquittee, who was, by definition, competent to stand trial, was reasonably in touch with reality at the later time of trial.¹⁵⁷ Not only is it true that, in general, severe mental disorder abates naturally in many cases, and is especially likely to abate if treated, but we can also be sure that this has occurred in the case of insanity acquittees. Further, the mental disorders of insanity acquittees are neither different from nor any harder to prove than the disorders of those subject to involuntary civil commitment: mental disorder is mental disorder. The mental disorder criterion provides no rational grounds for distinguishing between insanity acquittees and civil committees.

The dangerousness criterion appears to provide firmer ground for treating insanity acquittees differently. Let us assume, as has the Supreme Court,¹⁵⁸ that the commission of almost any crime betokens dangerousness. Because the conduct of all insanity acquittees satisfied the *prima facie* elements of some crime, almost all are ostensibly dangerous. By contrast, in many jurisdictions involuntary civil commitment can be based on criteria other than dangerousness to others, and the cri-

157. One of the difficulties with the implications of this assertion is that some defendants are competent to stand trial only if they continue taking psychotropic medication. This state of competence—sometimes termed “synthetic sanity”—has been held sufficient to try a defendant. *E.g.*, *State v. Pray*, 133 Vt. 253, 336 A.2d 174 (1975). The postacquittal problem arises because many disordered persons whose craziness abates substantially when they take their medication may become quite crazy again if they stop taking the medication. Once disordered persons are released, of course, it is difficult to insure that they will continue to take their medication. There is thus no guarantee that, once released, the acquittee will not become crazy and possibly dangerous again. This problem has caused at least one court to hold that a committed acquittee cannot be released until free of mental disorder without medication. *Wolonsky v. Balson*, 387 N.E.2d 625, 627 (1976).

158. *Jones v. United States*, 103 S. Ct. 3043, 3049 (1983).

terion of dangerousness to others can be satisfied by threats and other conduct that would not satisfy the prima facie elements of a crime. It appears, then, that insanity acquittees as a class are more dangerous than civil committees, but the differences are more apparent than real.

All civil committees are not less dangerous than insanity acquittees. Some civil committees have engaged in conduct that would satisfy the prima facie elements of a criminal offense. Moreover, it is reasonable to conclude that those civil committees who seriously threatened homicide or other severe harms are more dangerous than those who commit petty larceny or other lesser harms, although only the latter may be guilty of a criminal offense. Furthermore, although some civil committees are at least as dangerous as those who may be criminally convicted, the civil commitment system does not treat such "specially dangerous" committees specially, and applies the same commitment criteria and procedures to all committees. Consequently, the dangerousness betokened by an insanity acquittal is not greater than the dangerousness betokened by the conduct justifying civil commitment in many cases. In addition, because there are so few insanity acquittals and so many involuntary commitments, there are surely more "specially dangerous" civil committees than insanity acquittees. Finally, involuntary civil commitment is usually based on immediately past "dangerous" behavior, whereas postinsanity acquittal commitment is usually based on a dangerous act—the crime—that took place in the relatively distant past. Because the accuracy of behavioral predictions is positively correlated with the temporal immediacy of the past behavior on which the prediction is based, we can be more certain of the dangerousness of involuntary civil committees. Distinctions between classes need not be perfect to satisfy equal protection, but the dangerousness criterion is, at best, weak support for more onerous commitment procedures for the insanity acquittee.

The only counterargument with much force is based on the perception that insanity acquittees have almost always committed acts so serious that the civil system is unwilling to handle them. Murderers, rapists, and aggravated assaulters, for example, are acquitted by reason of insanity, but are rarely if ever processed solely in the civil system.¹⁵⁹ One concludes from this that acquittees are more dangerous as a class. Some

159. Although there are no firm statistics to prove the latter part of this assertion, research evidence on the characteristics of committees supports this. See C. WARREN, *THE COURT OF LAST RESORT* 170-74 (1982); Monahan, Caldeira & Friedlander, *Police and the Mentally Ill: A Comparison of Committed and Arrested Persons*, 2 INT'L J.L. & PSYCHIATRY 509, 513 (1979); Monahan, Ruggiero & Friedlander, *Stone-Roth Model of Civil Commitment and the California Dangerousness Standard*, 39 ARCHIVES OF GEN. PSYCHIATRY 1267, 1267 (1982). My experience with the civil

defendants are acquitted by reason of insanity for much less dangerous crimes, however, and many committees who only threaten great harms such as homicide or serious assault might well have committed these acts had they not been civilly committed. Indeed, if we did not believe there was a substantial likelihood that they would commit these acts, we would not commit them. Thus, the dangerousness distinction is still not as great as it first appears. Nonetheless, it is inescapably true that there are more actual, and not simply predicted, killers and aggravated assaulters among the insanity acquittees than among the civil committees. The special dangerousness of the former again appears to be a rational reason to treat them specially. Is not society entitled to extra certainty of safety before such persons are released?

If special criteria and procedures were applied only to those insanity acquittees who had committed acts so dangerous that the civil system would not process them, the distinction might hold. The Supreme Court held in *Jones v. United States*, however, that insanity acquittees who had borne the burden of persuasion themselves were distinguishable as a class.¹⁶⁰ Given the general ambivalence about the insanity defense and insanity acquittees, we can be sure that most courts and legislatures will follow suit. For the reasons I have given, however, I do not believe that special treatment of all insanity acquittees as a class has rational support. Furthermore, the lapse of time between the crime and trial and the low recidivism rates for serious crimes suggest that perhaps even persons acquitted by reason of insanity for serious crimes should not be distinguished from involuntary committees.

Assume that a distinction between insanity acquittees and civil committees is supportable. What procedural differences will fairly and rationally support the social goals underlying the distinction? The two major differences between postinsanity acquittal commitments and civil commitments are that, in the former, initial commitment is often automatic or adjudicated with a lower burden of persuasion and the burden of persuasion for release is placed on the acquittee.¹⁶¹ Automatic com-

commitment system in two jurisdictions and my conversations with others familiar with this system in other jurisdictions also confirm my conclusion.

160. 103 S. Ct. 3043, 3045-46 (1983).

161. A third major difference is that acquittees can be released only by judicial process, whereas committees can be released directly by the hospital. Morris, *supra* note 140, at 861-62, 885-88. This appears to be a substantial impediment to the acquittee's release; for instance, some courts have refused release despite unanimous psychiatric opinion that release was justified. *E.g.*, *United States v. Ecker*, 543 F.2d 178, 188-91 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). Nevertheless, I believe that this problem is less significant than the problems raised by those differences mentioned in the text because courts will generally accept a unanimous psychiatric recommendation for release

mitment is justified by the presumption of continuing dangerousness resulting from mental disorder based on the successful insanity defense. As I have shown, however, this presumption is not justified.¹⁶² At most, the state should be entitled to brief custody after an insanity acquittal during which the acquittee can be evaluated for a commitment hearing to assess present disorder and consequent dangerousness. The cost of a new hearing is outweighed by the acquittee's liberty interests. Social safety will not be compromised because the acquittee will be held until the hearing and then committed if the commitment criteria are satisfied. Moreover, the cost of a new hearing should be reduced for two reasons: first, the state may rely on the evidence adduced at the criminal trial (weak though it may be because of the lapse of time) and, second, because the acquittee will have been in custody for a substantial period by the time of the commitment hearing, the state will have had substantial opportunity to make the observations that will support its case. In other words, much of the cost of observation time must be borne whether or not a commitment hearing is held. Even if the cost is not reduced, it does not outweigh the defendant's interest in avoiding a particularly harsh and intrusive liberty infringement.

In involuntary civil commitment proceedings, the federal Constitution requires that the state bear the burden of persuasion by an intermediate standard of clear and convincing or clear and unequivocal evidence.¹⁶³ In addition, many states have held, on state constitutional grounds, that the state bears the burden of persuasion beyond a reasonable doubt.¹⁶⁴ Although involuntary commitment in the civil system is not punishment for crime, the courts have recognized the committee's substantial interest in avoiding wrongful deprivation of liberty and imposition of stigma. In contrast, the Supreme Court has upheld the constitutionality of placing the persuasion burden on the acquittee who wishes to be released in a postinsanity commitment proceeding.¹⁶⁵ Because acquit-

and hospitals are loath to release persons who have behaved highly dangerously unless they are quite confident that it is safe to do so. In light of society's interest in public safety, this procedural difference seems both small and justifiable, if any differences are justifiable.

162. See *supra* notes 156-57 and accompanying text; *accord*, Note, *supra* note 154, at 607-12.

163. *Addington v. Texas*, 441 U.S. at 418, 433 (1979).

164. *E.g.*, *In re Roulet*, 23 Cal. 3d 219, 590 P.2d 1, 152 Cal. Rptr. 425 (1979).

165. *Jones v. United States*, 103 S. Ct. 3043, 3045-46 (1983). Courts have also upheld a lower burden of persuasion at the initial commitment hearing on many of the same grounds. Even if acquittees are a distinguishable class, however, the risk of erroneous deprivation of liberty at a postacquittal commitment hearing is as great as at a civil commitment hearing, and arguably, therefore, the persuasion burden should not be lowered at the former. Note, *supra* note 154, at 612-17. Moreover, if acquittees are so obviously crazily dangerous, as proponents of the lowered burden contend, the state ought to have little difficulty meeting the higher burden. This is especially so because the

tees are allegedly more dangerous, the risk of their wrongful release is greater than the risk for civil committees and society is therefore entitled to reduce the risk of releasing acquittees by placing the burden of persuasion on them. Indeed, suggested post-Hinckley changes have placed the burden of persuasion on committees by the intermediate standard of clear and convincing evidence.¹⁶⁶ This is a difficult standard for the acquittee to meet, especially because the factfinder will know that the acquittee actually committed a criminal act.

Shifting the burden of persuasion to acquittees in order to reduce the risk of wrongful release may be rational if there is any supportable distinction between acquittees and committees, but this rationale weakens as time passes. The accuracy with which one can predict the acquittee's future crazy dangerousness on the basis of the act for which the person was acquitted decreases markedly as the time between the act and the prediction increases. After some period of time, future dangerousness based on the prior act does *not* justify shifting the burden of persuasion. At such a point, there is so little predictable dangerousness based on the prior dangerous behavior alone and so much liberty interest at stake for the acquittee that the burden of persuasion should shift back to the state.

But at what point should the burden of persuasion shift back to the state? Unfortunately, there are no data to indicate how much the risk of various harms decreases over time. We simply know that, in general, it does. Some have tried to deal with this dilemma by using the length of the prison term allowed for the acquittee's charged crime to dictate when the burden must shift.¹⁶⁷ If prison terms were based purely or even primarily on dangerousness concerns, this calculation might make sense, but, because this is not the case, we must find a different standard. Where data are lacking, the time period must be essentially arbitrary. For example, the Supreme Court has held that incompetence to stand trial commitments can last for only a "reasonable length of time" before the state must institute normal civil commitment proceedings or release the incompetent defendant.¹⁶⁸ Thus, perhaps the best the law can do is to place a "reasonableness" time limit on the period during which the acquittee must bear the burden of persuasion. In no case should it be longer than

dangerousness of acquittees will be based on acts, whereas that of committees will often be based on less determinate threats.

166. *E.g.*, The Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 403, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2057.

167. This was the defendant's claim in *Jones*, 103 S. Ct. at 3044. See *In re Moye*, 22 Cal. 3d 457, 463-68, 584 P.2d 1097, 1101-04, 149 Cal. Rptr. 491, 495-98 (1978).

168. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

the maximum term of incarceration permitted for the defendant's crime because dangerousness has at least some bearing on the length of prison or jail terms; thus, some nonarbitrary maximum time limit can be fixed. And in cases of serious crimes that carry very long sentences, the time allowed, paradoxically, should be shorter than the maximum incarceration period for the crime.

CONCLUSION

If we hate and fear crazy criminals too much and mistrust the release decisions of both mental health professionals and lay factfinders, we might decide to abolish the insanity defense or never to release those judged insane because we cannot be sure they are no longer disordered or dangerous (assuming the constitutionality of such a practice). If so, let us openly confront the injustice of the convictions or of the unnecessary and massive preventive detention of individuals wrongly held that will inevitably occur. If the real reason we do not wish to release those judged insane is an underlying desire to punish them, let us confront our hypocrisy and abolish the defense.

The cost to our society of valuing liberty so highly is that it increases the danger to us all, but we believe that the benefits of our freedom are worth the costs. Some released insanity acquittees, like many released convicts, will commit awful crimes again, but the number of the former will be small and their recidivism often will not be linked to mental disorder. I do not mean to minimize the difficulties in deciding whom to acquit or release, or the outrages that may be perpetrated by some released insanity acquittees. But the insanity defense is not responsible for the ghastly crime rate in our society, and, as a group, released insanity acquittees probably are not a substantial danger to society. Convicting and imprisoning nonresponsible, insane persons, or keeping all persons acquitted by reason of insanity incapacitated for life, will not make anyone appreciably safer. Societal safety will be enhanced far more if a higher percentage of those convicted of serious crimes serve the prison time that they deserve. Unlike insanity acquittees, these dangerous criminals account for a very high proportion of social danger, which their increased incapacitation would substantially reduce.

We should not abolish the insanity defense unless we truly believe that every perpetrator of a criminal act deserves to be punished, no matter how crazy. If we do not believe this, and I do not see how we can, then we must retain the defense.